TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 143

EMIL EIGER, OSCAR S. EIGER, AND JOSEPH EIGER,
PLAINTIFFS IN ERROR,

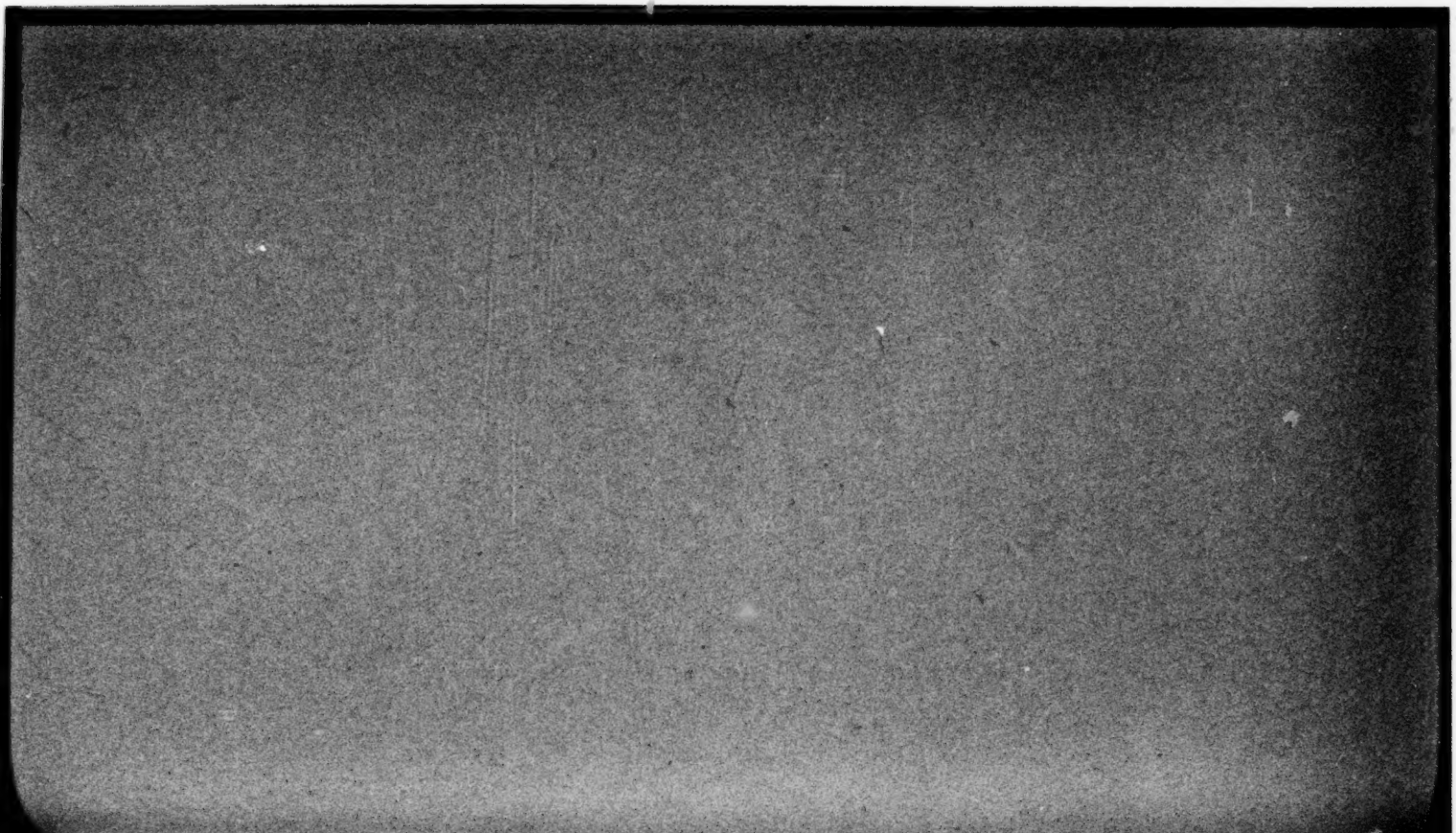
vs.

DELIA GARRITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED APRIL 5, 1916.

(25,230)



(25,230)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 947.

EMIL EIGER, OSCAR S. EIGER, AND JOSEPH EIGER,
PLAINTIFFS IN ERROR,

vs.

DELIA GARRITY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 STATE OF ILLINOIS, *ss:*

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of December, in the Year of Our Lord One Thousand Nine Hundred and Fifteen, within and for the State of Illinois.

Present:

William M. Farmer, Chief Justice.
Justice James H. Cartwright.
Justice Frank K. Dunn.
Justice Charles C. Craig.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice Warren W. Duncan.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered that to-wit, on the Sixteenth day of November, A. D. 1915, the same being one of the days in vacation before the term of Court aforesaid a record of the proceedings in the Circuit Court of Cook County was filed by appellants Emil Eiger, Joseph Eiger and Oscar Eiger in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

2 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the Honorable Frederick A. Smith, one of the Judges of the Circuit Court of Cook County, Illinois, at a term thereof begun and holden at Chicago, in the Court House in said County and State, on the third Monday (being the 20th day) of September in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and 40th.

Present:

Honorable Frederick A. Smith, one of the Judges of the Circuit Court of Cook County, State of Illinois.
Maclay Hoyne, State's Attorney.
John E. Traeger, Sheriff.

Attest:
JOHN W. RAINEY, *Clerk.*

Be it remembered that heretofore, to-wit, on the 1st day of December A. D. 1914 a certain Bill of Complaint was filed in the office of the Clerk of said Court, in words and figures following towit:

3 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court Thereof.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR S. EIGER.

To the Honorable Chancellors of said Court:

1. Humbly complain*ant* unto your honors your oratrix, Delia Garrity respectfully represents as follows:

1. That on June 18, 1912, she was the lawful wife of one William J. Garrity and had so been the wife of said Garrity for several years prior thereto and by reason of such relationship the said William J. Garrity became and was in duty bound to support and maintain your oratrix and was her means of support.

2. That one Clarence Green was on June 18, 1912, and had been for a long time prior thereto, to-wit, one year, the owner of and did then conduct what is commonly known as a saloon or dram shop and during such period of time sold intoxicating liquors in such dram-shop, which said dram shop was located in a certain building at what is commonly known as Number 134 North Dearborn Street in the City of Chicago in said Cook County and standing and being upon the parcel of land legally described as follows:

4 The east half of the North 100 feet of Lot One, (1) Block Thirty-eight (38) in original Town Of Chicago, Cook County, Illinois, subject to right of way, easement and alley over the South 10 feet thereof and subject to existing party wall agreement and party wall rights.

3. That on June 18, 1912, your oratrix began a certain suit at law in the Circuit Court of Cook County, Illinois, against said Clarence Green under the provisions of the Statute of the State of Illinois commonly called the Dram Shop Act to recover damages for injury to her means of support and filed therein her declaration and in such declaration alleged that she was on and prior to June 18, 1912, the wife of said William J. Garrity and that said Clarence Green was the keeper of a dram shop during said period of time to-wit one year prior to June 18, 1912 said Clarence Green sold and gave intoxicating liquors to her husband the said William J. Garrity which liquors in whole or in part caused the said William J. Garrity, during the period of time aforesaid to become habitually intoxicated and that said William J. Garrity, in consequence of such intoxication wasted and squandered his money and failed and neglected to support and maintain your oratrix and thereby caused injury to her means of

support, claiming therein damages to your oratrix in the sum of $10,000.00.

4. That said suit is known in the Circuit Court of Cook County as No. 314001 and therein on June 18, 1912, a summons was duly issued out of said court under the hand and seal of the Clerk thereof directing the sheriff of Cook County to make service upon said Clarence Green to the July Term of said court; that thereafter on June 19, 1912, said summons was duly served upon said
5 Clarence Green by the said Sheriff of Cook County more than ten days prior to the return day thereof; that said Clarence Green failed to appear in said suit and make his defense as required by law and thereafter on September 26, 1912, an order of default was in said suit entered against the said Clarence Green; and thereafter the cause came on for trial upon one of the regular trial calls of said court before one of the judges thereof and a jury for the assessment of damages therein; and thereafter on October 2, 1914, a jury was regularly impaneled and testimony taken and heard by the court and jury upon the issues presented in her declaration in said suit from witnesses duly sworn upon the witness stand and in open court and the jury having heard all the testimony submitted in said cause retired to consider their verdict; that thereafter the said jurors brought into court and returned their verdict in said cause wherein they found the defendant, Clarence Green, guilty and assessed the plaintiff's damages against said Clarence Green in the sum of $1500.00; that thereafter on October 2, 1914, a judgment was rendered by the court upon said verdict in favor of the plaintiff, Delia Garrity, against the defendant, Clarence Green in the sum of $1500.00 which said judgment stands unreversed of record and unsatisfied in whole or in part, a transcript of which judgment, for more exact proof thereof, is ready to be produced upon the trial hereof.

5. Your oratrix further represents that on January 1, 1909 said Emil Eiger became the owner and possessed of the building located upon the premises known as Number 134 North Dearborn Street in said City of Chicago, Illinois, hereinbefore legally described
6 and also of a leasehold interest upon the land, upon which said building was then and there located, commencing on October 1, 1907, and expiring September 30, A. D. 2105, by virtue of a conveyance to said Emil Eiger from one James D. Murphy and Margaret Mae Murphy, his wife, dated January 1, 1909, and filed of record in the Recorder's Office of Cook County on January 21, 1909, and there recorded in Book 10720 at Page 196; and thereafter on April 22, 1909, said Emil Eiger conveyed and quit claimed to said Joseph Eiger and Oscar S. Eiger of Chicago, Illinois, an undivided six tenths' interest in said building and said leasehold by a conveyance dated April 22, 1909, and filed for record April 23, 1909, in the Recorder's Office of Cook County, Illinois, and there placed of record in Book 10443 at Page 360.

6. Your oratrix further represents that for a year or more prior to the filing of the said suit in the Circuit Court of Cook County the said Clarence Green occupied the said building at 134 North Dear-

born Street for the purposes of the sale of intoxicating liquors as a tenant of the said Emil Eiger, Joseph Eiger and Oscar S. Eiger and that said Emil Eiger, Joseph Eiger and Oscar S. Eiger leased said building and premises to, and also unknowingly permitted said building and premises to be used and occupied by, said Clarence Green for the sale of intoxicating liquors, for the period of a year or more prior to the filing of said suit in the said Circuit Court of Cook County.

7 7. That the intoxicating liquors so sold or given to said William J. Garrity were sold or given to him by said Clarence Green in the aforesaid building at Number 134 North Dearborn Street and upon the premises hereinbefore described and were the sales or gifts which resulted in the verdict and judgment hereinbefore described; and such sales or gifts were made or given while the said Clarence Green occupied the said building as tenant of the said Emil Eiger, Joseph Eiger and Oscar S. Eiger, and with their knowledge and consent, for the purpose of keeping a dram shop.

8. Your oratrix further represents that by virtue of the facts hereinbefore set forth the said judgment of Fifteen Hundred ($1500.00) Dollars, the building, leasehold and premises above described has become liable for and subject to be sold to satisfy said judgment against said Clarence Green together with all costs and accrued interest thereunder.

II. For as much, therefore as your oratrix is without remedy in the premises except in the Court of equity and to the end that the said Emil Eiger, Joseph Eiger and Oscar S. Eiger who are made parties defendants to this bill may be required to make full and direct answer to same, under oath; that an account may be taken in this behalf by and under the directions of this Court and that the said defendants Emil Eiger, Joseph Eiger and Oscar S. Eiger may be decreed to pay to your Oratrix, the said sum of Fifteen Hundred ($1500.00) Dollars, together with interest thereon, from date of said judgment at the legal rate of interest together with the costs of said proceeding and that in default of said payment the said building leasehold and premises hereinabove described may be sold as may be directed by this Court to satisfy the amount due
8 together with the interest thereon and that your oratrix may have such other and further relief in the premises as equity may require and to your Honors may seem meet.

III. May it please your honor to grant the writ of summons in chancery directed to the sheriff of the said County of Cook and State of Illinois, commanding him that he summons the said defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger to appear before the said Court on the first day of the next December Term, A. D. 1914 to be held at the Court House in the City of Chicago, in the County of Cook aforesaid, then and there to answer this bill, etc.

DELIA GARRITY, *Complainant.*

ODE L. RANKIN,
Solicitor for Complainant.

Thereupon on the same day to-wit, on the 1st day of December A. D. 1914 a certain People's Writ of Summons issued out of the Office of Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

9 *Chancery Summons.*

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command that you summon Emil Eiger, Joseph Eiger and Oscar S. Eiger, if he shall be found in your County, personally to be and appear before the Circuit Court of Cook County on the first day of the term thereof, to be held at the Court House, in the City of Chicago, in said Cook County, on the third Monday of December, A. D. 1914, to answer unto Delia Garrity in her certain bill of complaint, filed in said Court on the Chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John W. Rainey, Clerk of our said Court, and the seal thereof, at Chicago, aforesaid, this 1 day of December, A. D. 1914.

JOHN W. RAINEY, *Clerk.*

(Endorsed:) Circuit Court of Cook County. Returnable to — Term, A. D. 191–. —— —— vs. —— ——. Summons in Chancery. —— ——, Solicitor.

Pd. 4.25.
M. 30.

Served this writ on the within named defendants Emil Eiger & Oscar S. Eiger, by delivering a copy thereof to each of them this 2nd, day of December 1914.

MICHAEL ZIMMER, *Sheriff.*
By HENRY CARROLL, *Deputy.*

The other within named defendant not found in my County this Dec. 21, 1914. John E. Traeger, Sheriff, by Henry Carroll, Deputy.

10 And afterwards to-wit, on the 19th day of December A. D. 1914 a certain Appearance was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B-6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER and OSCAR S. EIGER.

Appearance.

We hereby enter the appearance of Emil Eiger, Joseph Eiger and Oscar S. Eiger, defendants in the above entitled cause, and of ourselves as their, and each of their, solicitors.

D'ANCONA & PFLAUM,
Solicitors for said Defendants.

And afterwards to-wit, on the 19th day of January A. D. 1915 a certain Stipulation was filed in the office of the Clerk of said Court, in words and figures following to-wit:

11 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B-6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER and OSCAR S. EIGER.

Stipulation.

It is hereby stipulated and agreed, by and between the parties hereto, by their respective attorneys, that the time for the defendants, and each of them, to plead, answer or demur to the bill of complaint herein, be and the same is, hereby extended to and including the 30th day of January A. D. 1915.

Dated, Chicago, January 16, A. D. 1915.

ODE L. RANKIN,
Solicitor for Complainant.

And thereupon on the same day, to-wit, on the 19th day of January A. D. 1915 the following proceedings were had and entered of record in said court, to-wit:

12 Circuit Court of Cook County, —— Term, 1915.

Chancery. No. B-6930.

GARRITY
vs.
EMIL EIGER et al.

On motion of D'Ancona & Pflaum & Ode L. Rankin Solicitors for Defendants & Complainant, it is hereby ordered that the time for the defendants to plead, answer or demur to the bill of complaint in the above entitled cause be and the same is hereby extended to & including the 30th day of January A. D. 1915, as per stipulation filed herewith.

Entered 19th day of Jan'y, 1915.

THOMAS G. WINDES, *Judge.*

And afterwards to-wit on the 9th day of February A. D. 1915 a certain demurrer was filed in the office of the Clerk of said Court, in words and figures following to-wit:

13 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B-6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER and OSCAR S. EIGER.

The Demurrer of Emil Eiger, Joseph Eiger and Oscar S. Eiger, and Each of Them to the Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said Bill of Complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demur to said Bill and show that said Bill of Complaint is insufficient in law to require these defendants to make answer thereunto, and for cause of demurrer, these defendants, and each of them show:

1. That the complainant has not in and by her said Bill, made or stated such a case as entitled her in a court of equity to any discovery or relief from or against these defendants, or each of them, touching the matters contained in said Bill, or any of said matters.

2. That it appears by the complainant's said Bill that there is no privity between the complainant and these defendants, or either of them, to enable the said complainant to call upon these defendants, or either of them, for the recovery of any sums of money due under

the said alleged judgment set forth in the complainant's Bill of Complaint.

14 3. That the complainant has not, as appears by her said Bill, made out any title to the relief thereby prayed.

Wherefore, and for divers other goods causes of demurrer appearing in the said Bill of Compalint, these defendants and each of them, demur to said Bill of Compalint and to all matters and things therein contained, and humbly pray judgment of this Honorable Court whether they, or either of them, shall be compelled to make any further or other answer to the said Bill of Complaint, and humbly pray to be hence dismissed with their, and each of their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) EMIL EIGER,
(Signed) JOSEPH EIGER,
(Signed) OSCAR S. EIGER,
By D'ANCONA & PFLAUM,
Their and Each of Their Solicitors.

D'ANCONA & PFLAUM,
Solicitors for said Defendants.

I, Edwin B. Mayer, one of the solicitors for the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, in the foregoing Demurrer, do hereby certify that, in my opinion, the said demurrer is well founded in poi-t of law.

(Signed) EDWIN B. MAYER.

STATE OF ILLINOIS,
County of Cook, ss:

Maurice Markowitz, being duly sworn, deposes, and says that he is one of the solicitors for the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, in the above entitled cause and that the foregoing Demurrer is not interposed for purpose of delay.

(Signed) MAURICE MARKOWITZ.

15 Subscribed and sworn to before me this 9th day of February, A. D. 1915.

[SEAL.] (Signed) RICHARD FISCHER.
Notary Public.

And afterwards, to-wit on the 15th day of March A. D. 1915 the following proceedings were had and entered of record in said Court to-wit.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B–6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR S. EIGER.

Order.

This matter coming on to be heard on motion of Solicitors for the defendants herein, for leave to withdraw the general demurrer of the defendants heretofore filed herein and to file in lieu thereof a general and special demurrer; and the court being fully advised in the premises; it is hereby

Ordered, that leave be given to the defendants to withdraw the general demurrer heretofore filed herein, and leave is hereby
16 given to the defendants to file, instanter, a general and special demurrer.

JESSE A. BALDWIN, *Judge.*

And thereupon on the same day, to-wit, on the 15th day of March A. D. 1915 a certain General & Special Demurrer was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B–6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR S. EIGER.

The Demurrer of Emil Eiger, Joseph Eiger, and Oscar S. Eiger and Each of Them to the Bill of Complaint Herein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged demur to said Bill and show that said Bill of Complaint is insufficient in law to require

these defendants to make answer thereto, and for cause of demurrer these defendants, and each of them, show:

17 1. That the complainant has not in and by her said bill made or stated such a case as entitles her in a court of equity to any discovery from these defendants respectively, or any of them, or any relief against them, as to the matters contained in said bill, or any part of such matters, and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in said bill, or any of them, cannot be of any avail to the said complainant for any of the purposes for which the discovery is sought against these defendants by said bill or as entitles the said complainant to any relief in this court touching any of the matters therein complained of.

2. That it appears by the complain-t's said Bill, that there is no privity between the complainant and these defendants or either of them, to enable the said complainant to call upon these defendants, or either of them, for the recovery of any sums of money due under the said alleged judgment set forth in the complainant's Bill of Complaint.

3. That section 10 of Chapter 43 of the Illinois Revised Statutes, being the act governing dram-shops in the State of Illinois, which is the statute relied upon by the complainant in her Bill of Complaint in this suit, deprives the defendants of their property without due process of law and is repugnant to that part of the Constitution of the State of Illinois contained in Section 2, Article 2 of the Constitution of the State of Illinois of 1870, which is as follows, to-wit:

"No person shall be deprived of life, liberty or property without due process of law."

4. That section 10 of Chapter 43 of the Illinois Revised Statutes, being the act governing dram-shops in the State of Illinois, and which is the statute relied upon by the complainant in her bill of complaint in this suit, deprives the defendants of their property without due process of law and is repugnant to that part of the Constitution of the United States contained in Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is as Follows, to-wit:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside; No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Wherefore, and for divers other good causes of demurrer

18 appearing in said Bill of Complaint, these defendants, and each of them, demur to said Bill of Complaint and to all matters and things therein contained, and humbly pray judgment of this Honorable Court whether they, or either of them, shall be compelled to make any further or other answer to the said Bill of Complaint, and humbly pray to be hence dismissed with their, and

each of their reasonable costs and charges in this behalf most wrongfully sustained.

EMIL EIGER,
JOSEPH EIGER,
OSCAR S. EIGER,
By D'ANCONA & PFLAUM,
Their and Each of Their Solicitors.

D'ANCONA & PFLAUM,
Solicitors for said Defendants.

I, Maurice Markowitz, one of the solicitors for the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger in the foregoing Demurrer, do hereby certify that, in my opinion, said Demurrer is well founded in point of law.

MAURICE MARKOWITZ.

STATE OF ILLINOIS,
County of Cook, ss:

Fred C. Churchill, being first duly sworn, deposes, and says that he is one of the solicitors for the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger in the above entitled cause, and that the foregoing Demurrer is not interposed for purpose of delay.

FRED C. CHURCHILL.

19 Subscribed and sworn to before me this 13th day of March, A. D. 1915.

[SEAL.]

N. DUGAN,
Notary Public.

And afterwards, to-wit on the 11th day of October, A. D. 1915, the following proceedings were had and entered of record in said Court to-wit:

314,001.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER, and OSEAR S. EIGER.

Decree.

This day comes the complainant, Delia Garrity, by Ode L. Rankin, her solicitor, and also come Emil Eiger, Joseph Eiger and Oscar S. Eiger, defendants, by D'Ancona & Pflaum, their solicitors, and the said cause having come on now to be heard upon the Bill of Complaint of Delia Garrity, Complainant, and the demurrer of the said Emil Eiger, Joseph Eiger, and Oscar S. Eiger, to the said Bill of Complaint, filed herein on March 15, 1915; and the court having heard and considered said Bill of Complaint filed herein, and having heard and considered the said demurrer filed herein and hav-

ing heard the arguments of counsel, both for the complainant and for the defendants, upon the propositions and questions of law involved upon the record, and being now fully advised in the premises and in consideration thereof

It is ordered, adjudged and decreed that said demurrer
20 filed March 15, 1915, be and the same is hereby overruled and the same is overruled accordingly, to which ruling of the court the said defendants and each of them here and now duly except.

And the Complainant having moved the court for a rule upon said defendants to plead or answer to the said Bill of Complaint, and the court having called upon the said defendants by their counsel to set a time in which to plead or answer said Bill of Complaint, and the said defendants by their counsel having here and now chosen not to plead and having elected to stand by their said demurrer;

It is further ordered, adjudged and decreed that the Bill of Complaint herein be and the same is hereby taken as confessed by and against the said defendants Emil Eiger, Joseph Eiger and Oscar S. Eiger, for want of answer herein and because of their election to stand by their said demurrer; and the complainant having now moved the court for a decree Pro Confesso as against the said defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger; and

This cause having now come on to — heard upon the Bill of Complaint of Delia Garrity, complainant heretofore taken as confessed by and against the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, for want of an answer herein:

And the court being fully advised in the premises finds that the said Emil Eiger, Joseph Eiger and Oscar S. Eiger have been duly notified of the pendency of this suit by service of summons upon them and each of them more than ten (10) days prior to the first day of the December, 1914, Term of this court, and that the court has jurisdiction of the complainant, Delia Garrity, and of the defendants Emil Eiger, Joseph Eiger and Oscar S. Eiger, and
21 of the subject matter of this cause and all of the parties thereto, and that the said Emil Eiger, Joseph Eiger and Oscar S. Eiger have appeared in this cause and demurred to the said Bill of Complaint and, after the overruling of the said demurrer, have elected to stand by said demurrer, and having refused to plead or answer to the bill of Complaint herein, have objected and excepted to the said Bill of Complaint being taken as confessed against them because of their failure to plead or answer to the same, and because of their election to stand by their said demurrer.

The Court Further finds

1. That on June 18, 1912, the complainant, Delia Garrity was the lawful wife of one William J. Garrity, and had so been the wife of said Garrity for several years prior thereto, and by reason of such relationship the said William J. Garrity became and was in duty bound to support and maintain the complainant, Delia Garrity, and was her means of support.

2. That one Clarence Green was, on June 18, 1912, and had been for a long time prior thereto, to-wit, one year, the owner of and did

then conduct what is commonly known as a saloon or dram shop, and during such period of time sold intoxication liquors in such dram shop, which said dram shop was located in a certain building at what is commonly known as Number 134 North Dearborn Street, in the City of Chicago, in said Cook County, and standing and being upon the parcel of land legally described as follows:

22 The East half of the North 100 feet of Lot One (1) Block Thirty-eight (38) in original Town of Chicago, Cook County, Illinois, subject to right of way, easement and alley over the South 10 feet thereof and subject to existing party wall agreement and party wall rights.

3. That on June 18, 1912, the complainant, Delia Garrity, began a certain suit at law in the Circuit Court of Cook County, Illinois, against said Clarence Green under the provisions of the Statute of the State of Illinois, commonly called the Dram Shop Act, to recover damages for injury to *hear* means of support, and that the said Delia Garrity filed therein her declaration, and that in such declaration the said Delia Garrity alleged that she was, on and prior to June 18, 1912, the wife of said William J. Garrity, and that the said Clarence Green was the keeper of a dram shop during said period of time, to-wit, one year prior to June 18, 1912, and that said Clarence Green sold and gave intoxicating liquors to the husband of the complainant, the said William J. Garrity, which liquors in whole or in part caused the said William J. Garrity, during the period of time aforesaid, to become habitually intoxicated, and that the said William J. Garrity, in consequence of such intoxication, wasted and squandered his money and failed and neglected to support and maintain the complainant, Delia Garrity, and thereby caused injury to *hear* means of support, and that in said suit the complainant, Delia Garrity, claimed damages in the sum of Ten Thousand Dollars ($10,000.00).

4. That said suit is known in the Circuit Court of Cook County as No. 314,001, and that therein on June 18, 1912, a summons was duly issued out of said court under the hand and seal of the Clerk thereof directing the Sheriff of Cook County to make service upon the said Clarence Green to the July Term of said Court, that

23 thereafter and on June 19, 1912, said summons was duly served upon said Clarence Green by the said Sheriff of Cook County more than ten days prior to the return day thereof; that the said Clarence Green failed to appear in said suit and make his defense as required by law, and that thereafter, on September 26, 1912, *and* order of default was in said suit entered against the said Clarence Green; that thereafter the cause came on for trial upon one of the regular trial calls of said court before one of the judges thereof, and a jury for the assessment of damages therein; that thereafter on October 2, 1914, a jury was regularly impanelled and testimony taken and heard by the court and jury upon the issues presented in the declaration of the said Delia Garrity, complainant herein, filed in said suit, from witnesses duly sworn upon the witness stand and in open court, and that the jury, after having heard all the testimony submitted in said cause, retired to consider their

verdict, that thereafter the said jurors brought into court and returned their verdict in said cause wherein they found that the defendant, Clarence Green, was guilty, and assessed the plaintiff's damages against the said Clarence Green in the sum of Fifteen Hundred Dollars ($1,500.00); that thereafter, on October 2, 1914, a judgment was rendered by the court upon said verdict in favor of the said plaintiff Delia Garrity, against said Defendant Clarence Green, in the sum of Fifteen Hundred ($1,500.00), which said judgment stands unreversed of record and unsatisfied in whole or in part.

5. That on January 1, 1909, the said Emil Eiger became the owner and possessed of the building located upon the premises known as Number 134 North Dearborn Street, in said City of Chicago, Illinois, hereinbefore legally described, and also of a leasehold interest upon the land upon which said building was then and
21 there located, commencing on October 1, 1907, and expiring September 30, A. D. 2105, by virtue of a conveyance to said Emil Eiger from one James D. Murphy and Margaret Mae Murphy, his wife, dated January 1, 1909, and filed of record in the Recorder's Office of Cook County on January 21, 1909, and there recorded in Book 10720 at page 196; and that thereafter, on April 22, 1909, said Emil Eiger conveyed and quit-claimed to said Joseph Eiger and Oscar S. Eiger of Chicago, Illinois, an undivided six-tenths interest in said building and said leasehold, by a conveyance dated April 22, 1909, and filed for record April 23, 1909, in the Recorder's Office of Cook County, Illinois, and there placed of record in Book No. 10443 at page 360.

6. That for a year or more prior to the filing of the said suit in the Circuit Court of Cook County the said Clarence Green occupied the said building at Number 134 North Dearborn Street for the purposes of the sale of intoxicating liquors as a tenant of the said Emil Eiger, Joseph Eiger and Oscar S. Eiger, and that the said Emil Eiger, Joseph Eiger and Oscar S. Eiger leased said building and premises to, and also knowingly permitted said building and premises to be used and occupied by the said Clarence Green for the sale of intoxicating liquors for the period of a year or more prior to the filing of said suit in the Circuit Court of Cook County.

7. That the intoxicating liquors so sold or given to said William J. Garrity were sold or given to him by said Clarence Green in the aforesaid building at Number 134 North Dearborn Street, and upon the premises hereinbefore described, and were sales or gifts which resulted in the verdict and judgment hereinbefore described; and that such sales or gifts were made or given while the said Clarence Green occupied the said building as tenant of the said Emil
25 Eiger, Joseph Eiger and Oscar S. Eiger, and with their knowledge and consent, for the purpose of keeping a dram shop.

8. That by virtue of the facts hereinbefore set forth and found by this decree to exist, the building, leasehold and premises above described have become liable for and subject to be sold to satisfy said judgment against the said Clarence Green, together with all costs and accrued interest thereunder.

It is, therefore, ordered, adjudged and decreed that the said Emil Eiger, Joseph Eiger and Oscar S. Eiger be and they are hereby decreed to pay to the said Delia Garrity, within three (3) days, the said sum of Fifteen Hundred Dollars ($1500.00), together with interest thereon from the date of said judgment at five per cent (5%) per annum, to-wit, from October 2, 1914, to the date of such payment, and that they pay to the officers of this court the taxed costs of this cause; and that, unless the said defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, or either one of them, within three (3) days from the date of the entry of this decree, do pay or cause to be paid to the complainant, Delia Garrity, the said sum of Fifteen Hundred Dollars ($1500.00), together with the interest thereon at the rate of five per cent. (5%) per annum from the date of said judgment, to-wit, October 2, 1914, to the date of such payment, and pay to the officers of this court the taxed costs in this cause; all of the interest of said Emil Eiger, Joseph Eiger and Oscar S. Eiger held by them at the time of the filing of the Bill of Complaint herein, in the building, leasehold and premises in said Bill of Complaint and hereinbefore described, or so much thereof as may be necessary to pay the amount so found by this decree to be due to the complainant, Delia Garrity, upon said judgment and interest aforesaid, and which may be sold separately without material
26 injury to the parties in interest, be sold at public vendue to the highest bidder for cash by Louis J. Behan, Master in Chancery of this Court to whom this cause is hereby and by this decree referred, at the judicial sales room of the Chicago Real Estate Board, Number 26 North Dearborn Street, Chicago, Illinois, that said Master in Chancery give public notice of the time and place and terms of such sale by publishing the same at least once each week for three (3) successive weeks in some secular new-paper of general circulation, published in the City of Chicago, County of Cook and State of Illinois, and that the said complainant or any of the parties to this cause may become the purchaser at such sale; that upon said sale being made the said Master shall execute and deliver to the purchaser or purchasers thereof a certificate or certificates of sale evidencing such purchase, describing the premises purchased, the amount paid therefor, or if purchased by the complainant the amount of her bid, and the time when such purchaser or purchasers will be entitled to a deed for said premises, if the same shall not be redeemed according to law, and that within ten (10) days from such sale the said Master file a duplicate of such certificate or certificates in the office of the Recorder in said County of Cook.

That the said Master In Chancery, out of the proceeds of such sale, retain his fees, disbursements and commissions herein and pay to the officers of the court their costs in this cause, which are hereby ordered to be taxed by the Clerk of the Court, and out of the remainder pay the complainant Delia Garrity, the amount by this decree found to be due to her with interest thereon at the rate of five per cent. (5%) per annum from the date of said judgment
27 to the date of such sale, and, if such remainder shall not be sufficient to pay the said amount and interest, that he apply

the same to the extent to which it may reach in satisfaction thereof, and specify the amount of the deficiency in his report of such sale; and, if the remainder be more than sufficient to satisfy said amount and interest, that he hold the surplus subject to the further order of this court; and that he take a receipt from the respective parties to whom he may have made payment as aforesaid, and file the same with his report of sale in this court.

It is further ordered, adjudged and decreed that upon the expiration of fifteen (15) months after the date of such sale, if the premises so sold shall not be redeemed according to law, the defendants and all persons claiming under them or any of them since the commencement of this suit be forever barred and foreclosed of and from all right and equity of redemption or claim of, in and to said premises or any part thereof; and, if the said premises shall not be redeemed as aforesaid, then upon the production to the Master or his successor of the said certificate or certificates of sale by the legal holder thereof the said Master shall make, execute and deliver to the legal holder of said certificate or certificates, a good and sufficient deed of conveyance of said premises; and that thereupon the grantee or grantees in such deed, or his or her legal representatives or assigns, be let into possession of said premises; and that any of the parties to this cause, who shall be in possession of said premises or any portion thereof, or any person who may have come into such possession under them or any of them since the commencement of this suit, upon the production of the Master's Deed of conveyance and a certified copy of the order of the court con-
28 firming said sale, shall surrender possession of said premises to said grantee or grantees, his or her or their representatives or assigns.

It is further ordered, adjudged and decreed that the above cause be and the same is hereby referred to Louis J. Behan, Master in Chancery of this Court to carry out the provisions of this decree and to hold said sale and to do all of the things necessary and proper therein and thereabout as directed in this decree and according to the directions herein contained; and that the said Master, after having performed and carried out the provisions of this decree make his report of said sale and how he has carried out and performed the provisions hereof, in the due course of the business in his office as such Master.

And the said defendants, Emil Eiger, Joseph Eiger, and Oscar S. Eiger, having here and now objected and excepted to the entry of said decree and to all of the provisions thereof, and the court having considered their objections and overruled the same to which ruling of the Court the said defendants then and there excepted, the said defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, move the Court for an appeal from this decree and all of the provisions thereof to the Supreme Court of the State of Illinois, which appeal is allowed upon the defendants, Emil Eiger, Joseph Eiger and Oscar S. Eiger, filing their bond herein in the sum of Thirty-five

Hundred Dollars ($3500.00) with surety to be approved by the court, said bond to be filed within twenty days from the date hereof.

Enter:

FREDERICK A. SMITH, *Judge.*

29 And afterwards to-wit, on the 19th day of October A. D. 1915 a certain Appeal Bond was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

Richard Loewenthal, being on his oath first duly sworn, deposes, and say- that he is the same Richard Loewenthal who signed as surety the annexed bond dated the 15th day of October, 1915, from Emil Eiger, Joseph Eiger and Oscar S. Eiger, as principals, and Richard Loewenthal, as surety, to Delia Garrity, which said bond is in the sum of Three Thousand Five Hundred ($3500.00) Dollars.

Affiant further states that he is the owner of the following described real estate:

The East one hundred and fifty-five (155) feet *feet* of the North one hundred twenty and eight-tenths (120.8) feet of Block Eighteen (18), in Walsh & McMullen's Subdivision of the South three-quarters (S. ¾) of the South East quarter (S. E. ¼) of Section Twenty (20), Township Thirty-nine (39) North, Range fourteen (14) East of the Third (3rd) Principal Meridian, in Chicago, Cook County, Illinois;

that said property is worth the sum of One Hundred Thousand ($100,000) Dollars and is encumbered for the sum of Ten Thousand ($10,000.00) Dollars.

Affiant further states that he is worth over and above his liabilities, in excess of the sum of One Hundred Thousand ($100,000.) Dollars.

30 And further affiant saith not.

RICHARD LOEWENTHAL.

Subscribed and sworn to before me this 15th day of October, A. D. 1915.

[SEAL.] JOSEPH A. GOLDBERG,
Notary Public.

Know all men by these presents, That we Emil Eiger, Joseph Eiger, Oscar S. Eiger, as Principals and Richard Loewenthal as surety, of the County of Cook and State of Illinois, are held and firmly bound unto Delia Garrity also of the same County and State, in the pe*nal* sum of Three Thousand Five Hundred ($3,500) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents:

Witness our hands and seals this 15th day of October, A. D. 1915.

The condition of the above obligation is such, That Whereas, the said Delia Garrity did, on the eleventh day of October A. D. 1915, in the Circuit Court of Cook County, in the State aforesaid, and of the September Term thereof, A. D. 1915, recover a decree against the above bounden Emil Eiger, Joseph Eiger and Oscar S. Eiger for the payment of the sum of One Thousand Five Hundred ($1,500) Dollars with interest at the rate of 5% per annum from October 2, 1914, to date of payment, besides costs of suit; from which said decree of the said Circuit Court of Cook County, the said Emil Eiger, Joseph Eiger and Oscar S. Eiger, have prayed for, and obtained an appeal to the Supreme Court of said State:

31 Now therefore, if the said Emil Eiger, Joseph Eiger and Oscar S. Eiger shall duly prosecute their said appeal with effect, and moreover pay the amount of the decree with costs, interest and damages rendered, and to be rendered against them in case the said decree shall be affirmed in said Supreme Court, then the above obligations to be void, otherwise to remain in full force and virtue.

EMIL EIGER. [SEAL.]
JOSEPH EIGER. [SEAL.]
OSCAR S. EIGER. [SEAL.]
RICHARD LOEWENTHAL. [SEAL.]

Taken and entered into before me, at my office in — this — day of —, A. D. 19—.

——, *Clerk.*

Approved.
FREDERICK A. SMITH, *Judge.*

And afterwards to-wit, on the 1st day of November A. D. 1915 a certain Praecipe for Record was filed in the office of the Clerk of said Court, in words and figures following to-wit:

32 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

No. B-6930.

DELIA GARRITY
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR S. EIGER.

To the Clerk of the Circuit Court of Cook County:

The Clerk of the said Court is hereby requested to prepare a complete authenticated transcript of the record in the above entitled cause for use in the Supreme Court of the State of Illinois and certify to the correctness thereof.

Said transcript to contain the following:
1. Bill of Complaint.
2. Summons and Return.
3. Appearance of defendants Emil Eiger, Joseph Eiger and Oscar S. Eiger.
4. Stipulation filed January 19, 1915.
5. Demurrer of defendants filed February 9, 1915.
6. Order entered March 15, 1915.
7. General and Special Demurrer filed March 15, 1915.
8. All other orders entered in said cause.
9. Decree.
10. Appeal Bond.

Dated at Chicago, Illinois, this 23rd day of October A. D. 1915.

D'ANCONA & PFLAUM,
Solicitors for Defendants.

Statutory notice of filing of praecipe for a record for appeal to Supreme Court of State of Illinois is hereby waived.
10/23/15.

ODE L. RANKIN,
Solicitor for Complainant.

33 STATE OF ILLINOIS,
County of Cook, ss:

I, John W. Rainey, Clerk of the Circuit Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete Transcript of the Record in a certain cause lately pending in said Court, on the Chancery side thereof, between Delia Garrity Complainant and Emil Eiger, et al., Defendants.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 2nd day of November 1915.

[SEAL.] JOHN W. RAINEY, *Clerk.*

34 In the Supreme Court of Illinois, December Term, A. D. 1915.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER, JOSEPH EIGER and OSCAR S. EIGER, Appellants.

Appeal from Circuit Court of Cook County.

Honorable Frederick A. Smith, Judge, Presiding.

Assignment of Errors.

And now come the said Emil Eiger, Joseph Eiger and Oscar S. Eiger, appellants, by D'Ancona & Pflaum, their solicitors, and say

that in the record and proceedings and in the overruling of appellants' general and special demurrer and in rendering the decree aforesaid, there is manifest error, in this, to-wit:

I. The Court below erred in overruling the general and special demurrer of the defendants.

II. The Court below erred in entering the decree herein in favor of the complainant and against the defendants.

III. The decree is contrary to law.

IV. Section 10, Chapter 43, of the Revised Statutes of the State of Illinois does not justify entering the decree herein.

V. Enforcing a decree under Section 10, Chapter 43, Illinois Statutes, deprives appellants of their property without due process of law.

VI. Section 10 of Chapter 43, Illinois Statutes, is repugnant to Section 2, Article 2, of the Constitution of the State of Illinois.

VIII. Section 10, Chapter 43, Illinois Statutes, is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

D'ANCONA & PFLAUM,
Solicitors for Appellants.

35 And afterwards, to-wit, on the 21st day of December, A. D. 1915, the same being one of the days of the said December term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 10489.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR EIGER, Appellants.

Appeal Circuit Court, Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that —— ——, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by A. J. Pflaum for appellant and Ode L. Rankin for appellee, is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

36 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of February, in the Year of Our Lord One Thousand Nine Hundred and Sixteen, Within and for the State of Illinois.

Present:

Chief Justice William M. Farmer.
Justice James H. Cartwright.
Justice Frank K. Dunn.
Justice Charles C. Craig.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice Warren W. Duncan.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit: on the 16th day of February, A. D. 1916, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

February 16th, A. D. 1916.

No. 10489.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER, JOSEPH EIGER, and OSCAR EIGER, Appellants.

Appeal from Circuit Court, Cook.

Error to —.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Decree of the Circuit Court aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that

the said Appellee recover of and from the said Appellants costs by her in this behalf expended, to be taxed, and that she have execution therefor.

37 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the First Day of February, in the Year of Our Lord One Thousand Nine Hundred and Sixteen, Within and for the State of Illinois.

Present:

Chief Justice William M. Farmer.
Justice James H. Cartwright.
Justice Frank K. Dunn.
Justice Charles C. Craig.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice Warren W. Duncan.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that afterward, to-wit: on the 16th day of February, 1916, the opinion of the Court [illegible] said cause and entered of record in the words and [illegible]ng, to-wit:

No. 104[illegible]

DELIA GARRITY, Appellee,
v.
EMIL EIGER et al., Appellants.

Appeal from Circuit Court, Cook.

Error to —.

38 December Term, 1915.

Docket No. 10489; Agenda 56.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER et al., Appellants.

Appeal from Circuit Court, Cook County.

CARTWRIGHT:

The appellee, Delia Garrity, filed her bill in the Circuit Court of Cook County against the appellants, Emil Eiger, Joseph Eiger

and Oscar S. Eiger, to subject premises owned by them to the payment of a judgment recovered by her against Clarence Green for injury to her means of support occasioned by the sale of intoxicating liquors to her husband by said Clarence Green. The defendants, demurred to the bill alleging as special grounds of demurrer that there was no privity between the complainant and them which enabled her to call upon them for payment of the judgment, and that section 10 of the act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors is unconstitutional and invalid in depriving them of their property without due process of law in violation of Section 2 of Article 2 of the Constitution and the Fourteenth Amendment of the Constitution of the United States. The demurrer was overruled and the defendants having elected to stand by it the bill was taken as confessed and the court having found the facts alleged in the bill entered a decree for the amount of the judgment with costs of suit and ordered the premises sold to satisfy the decree subject to the statutory right of redemption. From that decree this appeal was prosecuted.

39 In addition to disputing the validity of Section 10, counsel for appellants contend that upon a correct construction of the section no action can be maintained under it unless the complainant alleges and proves the cause of action against the keeper of the dram-shop and the amount of damages sustained with a right to the owner of the premises to contest the same. The argument is that Section 9 and 10 must be construed together in order to discover the legislaitve intent and that when so construed the intent of the General Assembly that the owner of the premises sought to be subjected to the payment of the judgment under Section 10 has the same right to contest the cause of action and the amount of damages as if sued under Section 9, becomes clearly manifest. Reading Section 10 with Section 9 clearly shows that there was no such intention, since the purpose of the two sections are essentially different. Section 9 makes the owner of the premises personally liable severally or jointly with the keeper of the dram-shop for all damages sustained by causing in whole or in part the intoxication of any person and he may be sued alone or with the keeper of the dram-shop. Any judgment obtained under that section would be personal judgment against him, to the payment of which all his property, personal and real, wherever situated would be subject. Section 10, on the other hand, makes the building or premises used or occupied for the sale of intoxicating liquors liable for the payment of any judgment against the person occupying the building or premises, provided the owner has rented or leased the same to be used or occupied in whole or in part

40 for the sale of intoxicating liquors or has knowingly permitted the same to be so used or occupied. Section 10 provides that the premises shall be liable for and may be sold to pay any judgment against the person occupying the premises and there is no language in either section which would justify an inference that the General Assembly intended anything different. It would be an unwarranted conclusion that the General Assembly after providing by section 9 for a remedy by suit against the owner in which a

personal judgment would be rendered intended by Section 10 in providing for another suit to subject the premises to the payment of a judgment against the dram-shop keeper that the issues once tried and settled should be again tried in a collateral suit to obtain satisfaction of the judgment. The same decisions of the Supreme Court of Iowa which were mentioned and commented on in Wall v. Allen, 244 Ill. 456, and with which this court did not agree for reasons there stated are again cited, quoted from and relied upon to sustain the argument that the complainant must allege and prove the original cause of action and amount of damages. This court pointed out in that case that such an interpretation of Section 10 as would require the aggrieved party to prove the original cause of action and the amount of damages and that the only effect of Section 10 is to limit the amount of the lien would be to say that the premises are not liable for or subject to the payment of the judgment against the dram-shop keeper but will be liable to some other judgment to be recovered in a second action. If that were true the judg-
41 ment against the dram-shop keeper finally and conclusively settling the existence of the cause of action and the amount of damages would go for nothing and a second jury might either decide that there was no cause of action against the dram-shop keeper or if there was that the damages that were suffered were only a fraction of the amount recovered, so that the premises would not be subjected to the lien of the judgment as the statute declares they shall be. Counsel also argue that Section 9 giving the right to a personal action against the owner implies a legislative intention that notice of either unlawful sales or unlawful giving away of liquor to an intoxicated person is to be given to the owner of the premises so that he can save himself from prosecution on account of the unlawful acts of the person selling liquor in his premises. Section 9 contains no such condition and no notice of a particular sale could have been contemplated since the liability is created for devoting the premises to the sale of intoxicating liquor with its natural consequences and notice that the consequences had resulted in a particular case would be of no avail to the owner. The question whether a sale causing damage was lawful or unlawful is immaterial, and is not a condition to the liability of the owner to compensate the injured party for the damages resulting from the business. Injury may result from a lawful sale of liquor to a sober person who is not in the habit of becoming intoxicated where it is to be taken away and not to be drunk on the premises, or a sale to a person not intoxicated may cause intoxication and result in injury. The owner is put on notice by the statute and having rented his property or permitted it to be used for the purpose which he knows may be followed by
42 injury he is not entitled to any further notice at the time a sale is made, or to be informed that it is going to be made. Under the conditions provided by the statutes the business with its natural and ordinary consequences is not carried on without the knowledge, consent or connivance of the owner but he does participate in the business of selling intoxicating liquor by devoting his premises or permitting them to be devoted to carrying on that busi-

ness. In Wanack v. Michels, 215 Ill. 87, suit was brought and a judgment recovered against the dram-shop keeper and the owner of the building, and a second suit was brought upon the dram-shop keeper's bond and the bill was filed by the surety on the bond for contribution. It was held that the obligation of the owner under section 9 is primary; that under that section he is not in any sense a surety for the occupant of his premises who sells the liquor but is a joint wrongdoer with such occupant and therefore not a co-surety with the surety on the bond. The court held that the wrong doing of the owner of the premises who leases them with permission to the occupant to sell intoxicating liquor thereon and with knowledge that such liquor is sold thereon cannot be said not to be intentional, but the owner, under the circumstances mentioned in the statute, must be regarded as committing the tortious act with guilty intent. If the fact suggested by counsel that the dram-shop keeper is often with meager income and little property and may not care to contest the action against him is true, the inability to recover anything from him furnishes a potent reason for the provision of Section 10 that the property where the business is carried on shall be liable for
the payment of the judgment in order to accomplish the
43 purpose of the statute declared in its title, to provide against
the evils arising from the sale of intoxicating liquors. The fact that judgment is recovered by default, if without fraud or collusion, is of no importance and its validity cannot be assailed on that ground. The owner necessarily knows that a valid judgment may be so obtained and the law protects him against a judgment obtained by fraud or collusion. (Wing v. Little, 267 Ill., 20.) The language of Section 10 is plain and the legislative intent clearly manifest.

One special ground of demurrer was that Section 10 deprives the owner of premises which he has leased for the sale of intoxicating liquor or knowingly permitted to be devoted to such use, without due process of law contrary to Section 2 of Article 2 of the Constitution and the Fourteenth Amendment of the Constitution of the United States. The question of the validity of that Section was presented and determined in Wall v. Allen, supra, but it is strenuously contended that the decision was wrong and ought to be overruled. Counsel say that while the court in that case said that the defendant is permitted to controvert the facts upon which the lien rests, the right to controvert them was in fact denied. Counsel misunderstand the decision in that case which was that the owner is not deprived of his property without due process of law when he is permitted to controvert the facts which create the lien. Those facts, as specified in the statute are that he shall rent or lease to another his building or premises to be used or occupied in whole or in part for the sale of intoxicating liquor or shall knowingly permit the same to be so used or occupied and that a judgment has been
recovered against the person occupying the building or
44 premises for damages in consequence of the sale of intoxicating liquor on his premises. These are the facts and the only facts which by the statute render the premises liable for the payment of a judgment and the owner is permitted to controvert them.

If the statute is valid there is no want of due process of law in its enforcement and the bill in this case averred every one of the facts creating the lien and rendering the premises liable.

The statute was enacted under the police power of the State which extends to every matter involving the protection of the lives, health and property of the citizens and the preservation of good order and public morals, and it is not only within the power but it is the duty of the General Assembly to enact laws for that purpose. The police power was never granted by the several states to the Federal Government nor surrendered by them and even in matters within the jurisdiction of Congress the several states may still freely exercise the police power. In the License Cases, 5 How. 504, Mr. Justice Grier, speaking for the Supreme Court of the United States, said; "It is not necessary for the sake of justifying the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power which is exclusively in the states is alone competent to the correction of this great evil and all measures of restraint or prohibition necessary to effect this purpose are within the scope of that authority." In the case of Barbier v. Connolly, 113 U. S. 27, the same court held that neither the Fourteenth
45 Amendment to the Federal Constitution nor any other amendment was designed to interfere with the police power of the state to prescribe regulations to promote the health, peace, morals education, and good order of the people; that legislation respecting the liquor traffic does not come within the Fourteenth Amendment in any case unless it is apparent that its real object is not to protect the community or to promote the general well being, but under the guise of police regulation to deprive the owner of his liberty or property without due process of law, and that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. There is no shadow of ground for saying that Section 10 comes within the exception mentioned in that case and therefore questions concerning the Fourteenth Amendment may be dismissed from the case. This court considered the relation of the liquor traffic to the police power in Goddard v. Town of Jacksonville, 15 Ill. 588, and there has never been any question in any court but that any conditions which legislative authority may hedge about the traffic are legal and valid. Any one entering into the business or leasing his property for it must necessarily accept and agree to be bound by the provisions of the law designed to mitigate the evils of the traffic or to compensate for the damages done by it. Intoxicating liquor cannot be sold without a place in which the business is conducted and the owner who furnishes premises necessary to the carrying on of the business is an actual participant in it. If he provides a building or premises
for another to conduct a business the usual and ordinary re-
46 sult of which is damage to individuals, he cannot complain that his property is held to compensate the injured party. Having voluntarily devoted his property to a use causing damage and brought it within the conditions prescribed by the statute he makes

it a surety for the payment of any judgment recovered against the occupant of the premises. In deciding that a statute making a judgment for fines and costs for a violation of the liquor law a lien upon the premises where liquor is sold is valid, the Supreme Court of Kansas held that the relation of the owner was that of a surety and said that the object of the statute was to provide an indemnity to the State for the fines and costs and that they were not imposed upon the owner but upon the person violating the law, and the owner of the premises was simply made a surety for their payment. (Hardten v. State 32 Kan. 637) In harmony with that decision is the case of Polk County v. Hierb, 37 Ia. 361, where it was held that a statute of that nature subjects the property of the owner to forfeiture for his own act and not for that of another; that intoxicating liquor cannot be sold without a place in which the sale is conducted and if a party knowingly furnishes the place it is for his act that his property is liable to the charge if judgment is rendered against the seller. On the same ground an act making the premises where intoxicating liquor is sold liable for damages assessed against the person occupying the premises is valid and not repugnant to any constitutional provision. (Mullen v. Peck, 49 Ohio St. 447; Goodman v. Hailes, 59 id. 342; Bertholf v. O'Reilly, 74 N. Y. 509) The question whether a surety has a right to demand proof of the cause of action against the one for whom he is surety depends entirely upon the nature of the obligation entered into and if the
47 obligation is to pay a judgment recovered against the party for whom he is surety, he cannot require proofs of the facts on which the judgment rests. In such a case he is bound and concluded by the judgment against the principal and is not entitled to contest either the breach of the obligation or the amount of damages. The suit against the surety is a collateral action founded on the judgment and where there has been a judgment it cannot be inquired into except for fraud. (Ralston v. Wood, 15 Ill. 159; Housh v. People, 63 id. 178; Nevitt v. Woodburn, 160 id. 203.) the judgment against the principal in such case is res judicata and cannot be attacked collaterally by the surety unless for fraud or collusion. The statute provides in the same language as Section 10 that proceedings may be had to subject premises used or occupied, in whole or in part for gambling to pay any judgment that may be recovered for losses at gaming therein. In Wing v. Little, supra, the similarity between that act and Section 10 was noted and it was said that both statutes were passed under the general police power and designed to mitigate the evils arising from the subjects in which they deal. It was declared that the lien created by the statute concerning gaming is for the amount of the judgment and where a judgment has been obtained in an adversary proceeding and without fraud or collusion all questions are foreclosed in the proceeding to subject the premises to the payment of the judgment except the question whether the owner has knowingly permitted them to be used for specified purposes. It was said that the language of that statute precluded the construction that the premises were to be held liable for

whatever might be shown upon the hearing to have been
48 lost. The language in the two statutes is the same and the same rule must apply, and as before noted the question whether the business of selling liquor or a particular sale is lawful or unlawful is of no importance. A judgment obtained by fraud or collusion is not binding upon any one, but in the absence of fraud or collusion the judgment against the occupant is conclusive against the owner who, chargeable with a knowledge of the law, has voluntarily devoted his premises to the sale of intoxicating liquor.

The decree is affirmed.

Decree Affirmed.

49 *Authentication of Record.*

SUPREME COURT, STATE OF ILLINOIS, *ss:*

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Delia Garrity, Defendant in Error, vs. Emil Eiger, Joseph Eiger and Oscar S. Eiger, Plaintiffs in Error, and also of the Opinion of the court rendered therein as the same now appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 30th day of March, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk Supreme Court.

50 Be it remembered that to-wit, on the 14th day of March, 1915, there was duly filed by Emil Eiger et al. in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. William M. Farmer, Chief Justice of the Supreme Court of Illinois, with the endorsement by the said Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

51 Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the Supreme Court of Illinois, February Term, A. D. 1916.

No. 10489.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER et al., Appellants.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of the State of Illinois:

Now come your Petitioners, Emil Eiger, Oscar S. Eiger and Joseph Eiger, by Abraham J. Pflaum, their solicitor, and represent and state to the Honorable Chief Justice of the Supreme Court of the State of Illinois that on the 16th day of February, A. D. 1916, the Supreme Court of Illinois rendered a final judgment against your Petitioners in a certain cause then pending before it, wherein your Petitioners were appellants and Delia Garrity was appellee; that said judgment affirmed a decree theretofore entered by the Circuit Court of Cook County, Illinois, on the 11th day of October, A. D. 1915, against your Petitioners and in favor of said appellee; that no petition for re-hearing has been filed, as prescribed by the rules of this Honorable Court; that said Supreme Court of Illinois is the highest court of law or equity in said State of Illinois in which a decision can be had in said suit, and in which said Court said final judgment was rendered again your Petitioners as hereinbefore set forth; that the record of said suit is now presented to your Honor, and from said record it will appear, and your Petitioners represent and state the following:

52 1. That on the trial of said cause in said Circuit Court of Cook County and in the proceedings in said Supreme Court, upon the review of said decree and judgment of said Circuit Court, there was set up by your petitioners, and each of them, and drawn in question and finally decided adversely to your petitioners, and each of them, by said judgment of said Supreme Court, a claim of privilege and immunity belonging to your petitioners, and each of them, under the Fourteenth Amendment to the Constitution of the United States.

2. That from the record of said suit herewith presented to your Honor, it will appear that in said suit in said Circuit Court and in said proceedings in said Supreme Court there was drawn in question by your petitioners, and each of them, the validity of Section 10, of Chapter 43 of the Revised Statutes of the State of Illinois, pur-

porting to impose liability upon the property of your petitioners for judgment against third persons.

3. That by the said record referred to, it is shown that the validity of said statute was drawn in question in said suit by your petitioners, and each of them, in said Circuit Court and in the proceedings in said Supreme Court, and that said statute was claimed by them, and each of them, to be invalid because it contravenes the Fourteenth Amendment to the United States Constitution, in that it deprives your petitioners of their property without due process of law and denies to them, and each of them, the equal protection of the law.

4. That the question of the constitutionality of said statute under the Fourteenth Amendment to the Constitution of the United States, so raised and drawn in question in said Circuit Court of Cook County and in said Supreme Court, as depriving your petitioners, and each of them, of their property without due process
53 of law and in denying to them, and each of them, the equal protection of the laws, is set up and presented in said record and is shown thereby to have been decided adversely to your petitioners, and each of them, as will more particularly appear from the Assignment of Errors hereinafter more particularly set forth, and hereto attached.

5. That as appears from such Assignment of Errors and the matters hereinabove set forth, the judgment of said Supreme Court will deprive your petitioners, and each of them, of their property without due process of law, and denies to them, and each of them, the equal protection of the laws, in contravention of the Fourteenth Amendment to the United States Constitution, and will take from them, and each of them, the rights, privileges and immunities accorded to them, and each of them, by the Constitution of the United States and the Fourteenth Amendment thereto; all of which will appear from the record and proceedings in said cause.

Wherefore, your petitioners pray that a Writ of Error issue in this behalf, returnable unto the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioners will ever pray.

EMIL EIGER,
OSCAR S. EIGER,
JOSEPH EIGER,
By ABRAHAM J. PFLAUM,
Their Solicitor.

54 [Endorsed:] No. 10489. In the Supreme Court of Illinois. Delia Garrity, vs. Emil Eiger et al., Appellants. Petition for Writ of Error. Law Offices, D'Ancona & Pflaum, 1038-1045 Stock Exchange Building, 30 N. La Salle Street, Chicago. Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

55 Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA,
State of Illinois, ss:

In the Supreme Court of Illinois, February Term, A. D. 1916.

No. 10489.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER et al., Appellants.

Assignment of Errors.

Now come the Petitioners, Emil Eiger, Oscar S. Eiger and Joseph Eiger, by Abraham J. Pflaum, their solicitor, and say that in the record and proceedings in the above entitled cause there is manifest error, in this:

1. The judgment of the Supreme Court of the State of Illinois deprives them, and each of them, of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The judgment of said Court denies to them, and each of them, the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The said Court erred in holding that Section 10, of Chapter 43 of the Revised Statutes of the State of Illinois, if enforced, will not deprive them, and each of them, of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. Said Court erred in holding that said Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois, if enforced, will not deny them, and each of them, the equal protection of the laws, in contravention of the Fourteenth Amendment to the Con-
56 stitution of the United States.

5. The said Court erred in not reversing the judgment and decree of the Circuit Court of Cook County, Illinois.

6. The said Court erred in affirming the judgment and decree of the Circuit Court of Cook County, Illinois.

ABRAHAM J. PFLAUM,
Solicitor for Petitioners.

The Writ of Error above applied for is hereby allowed, upon the execution of a bond by the appellants in the sum of Five Hundred ($500.) Dollars, in the form provided by statute in such case, and its approval, said Writ of Error to operate as a supersedeas.

WILLIAM M. FARMER,
Chief Justice of the Supreme Court of Illinois.

57 [Endorsed:] No. 10489. In the Supreme Court of Illinois. Delia Garrity, Appellee, vs. Emil Eiger et al., Appellants. Assignment of Errors. Law Offices D'Ancona & Pflaum, 1038-1045 Stock Exchange Building, 30 N. La Salle Street, Chicago. Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

58 Be It Remembered that to-wit, on the 14th day of March, A. D. 1915, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Emil Eiger et al. an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which bond is in words and figures as follows, to-wit:

59 UNITED STATES OF AMERICA,
State of Illinois, ss:

In the Supreme Court of Illinois, February Term, A. D. 1916.

No. 10489.

DELIA GARRITY, Appellee,
vs.
EMIL EIGER et al., Appellants.

Know all men by these presents, That we, Emil Eiger, Joseph Eiger and Oscar S. Eiger, as principals, and Richard Loewenthal, as surety, of the City of Chicago, County of Cook and State of Illinois, are held and firmly bound unto the above named Delia Garrity in the full and just sum of Five Hundred ($500) Dollars to be paid to the said Delia Garrity, her successors, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our successors, heirs executors and administrators, jointly and severally, firmly by these presents:

Witness our Hands and seals this 9th day of March, in the year of our Lord One Thousand Nine Hundred and Sixteen.

Whereas, lately, at a session of the Supreme Court of the State of Illinois in a suit pending in said court between Delia Garrity, appellee therein, and Emil Eiger, Joseph Eiger and Oscar S. Eiger, appellants therein, a judgment was rendered against said appellants therein and the said appellants therein having prayed for and obtained a Writ of Error returnable into the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now the condition of the above obligation is such that if the said appellants therein shall prosecute their Writ to effect and shall answer all damages and costs that may be awarded against them if they fail to make *this* plea good, then the above obligation

60 to be void, to otherwise remain in full force and virtue.

EMIL EIGER. [SEAL.]
JOSEPH EIGER. [SEAL.]
OSCAR S. EIGER. [SEAL.]
RICHARD LOEWENTHAL. [SEAL.]

Approved by

WILLIAM M. FARMER,
Chief Justice of the Supreme Court of Illinois.

O. K.
RANKIN & DUNN,
Solicitors for Appellee.

61 Be it remembered that on the 14th day of March, A. D. 1916, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows, to-wit:

62 Filed Mar. 14, '16 Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, between Emil Eiger, Oscar S. Eiger and Joseph Eiger, and Delia Garrity, wherein was drawn in question the validity of a statute passed by the Legislature of the State of Illinois and an authority exercised under said State on the ground of their being repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of their validity, and wherein was drawn in question the construction of such Amendment to the said Constitution and the decision was against the title, right, privilege and exemption, specially set up and claimed under such Amendment, and a manifest error hath happened, to the great damage of the said Emil Eiger, Oscar S. Eiger and Joseph Eiger, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

63 Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the — day of

March in the year of our Lord one thousand nine hundred and sixteen.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MacMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by
WILLIAM M. FARMER,
Chief Justice of the Supreme Court of Illinois.

[Endorsed:] Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

64 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such Clerk on the 14th day of March, A. D. 1916, in the matter of Delia Garrity, Defendant in Error, vs. Emil Eiger, Joseph Eiger, and Oscar S. Eiger, Plaintiffs in Error,

1. The original bond of which a copy is herein set forth.
2. A copy of the writ of error to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Illinois, this 30th day of March, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk Supreme Court.

65 And on to-wit, the 14th day of March, A. D. 1916, a certain Citation showing service on attorneys for Delia Garrity, defendant in error, was filed in the office of the Clerk of the Supreme Court and is as follows, to-wit:

66 Filed Mar. 14, 1916. Chas. W. Vail, Clerk Supreme Court.

UNITED STATES OF AMERICA, *ss:*

To Delia Garrity, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Illinois, wherein Emil Eiger, Oscar S. Eiger and Joseph Eiger are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error,

as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William M. Farmer, Chief Justice of the Supreme Court of Illinois, this 13th day of March in the year of our Lord one thousand nine hundred and sixteen.

WILLIAM M. FARMER,
Chief Justice of the Supreme Court of the State of Illinois.

Copy of the foregoing citation received this 13th day of March, A. D. 1916.

ODE L. RANKIN,
WILLIAM C. DUNN,
Attorneys for Defendant in Error.

67 [Endorsed:] No. 10489. Supreme Court of Illinois. Delia Garrity, Appellee, vs. Emil Eiger et al., Appellant. Original citation. Law offices D'Ancona & Pflaum, 1038 Stock Exchange Building, 30 N. La Salle Street, Chicago. Filed Mar. 14, '16. Chas. W. Vail, Clerk Supreme Court.

68 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Illinois, in the City of Springfield, this 30th day of March, A. D. 1916.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHAS. W. VAIL,
Clerk Supreme Court.

Endorsed on cover: File No. 25,230. Illinois Supreme Court. Term No. 947. Emil Eiger, Oscar S. Eiger, and Joseph Eiger, plaintiffs in error, vs. Delia Garrity. Filed April 8th, 1916. File No. 25,230.

24

Office Supreme Court, U. S.
FILED
OCT 25 1917
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 143.

EMIL EIGER, OSCAR S. EIGER and JOSEPH EIGER,
Plaintiffs in Error,
vs.
DELIA GARRITY,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

EDWARD N. D'ANCONA,
ABRAHAM J. PFLAUM,
SOLICITORS FOR PLAINTIFFS IN ERROR.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1917.

No. 143.

EMIL EIGER, OSCAR S. EIGER and JOSEPH EIGER,
Plaintiffs in Error,
vs.
DELIA GARRITY,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

To the Honorable Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

This is a writ of error to review a decision of the Supreme Court of the State of Illinois, sustaining a decree of the Circuit Court of Cook County directing that the premises owned by plaintiffs in error be sold to satisfy a judgment recovered by defendant in error against one Clarence Green for injury to her means of support, occasioned by the sale of intoxicating liquors by the said Clarence Green to the husband of defendant in error.

The bill of complaint alleges that the defendant in error, Delia Garrity, is the wife of William J. Garrity, who was in duty bound to support and maintain her and was her means of support, and that on June 18, 1912, she began a suit in the Circuit Court of Cook County against Clarence Green, under the provisions of Sections 9 and 10 of Chapter 43 of the Revised Statutes of the State of Illinois, known as the Dramshop Act, to recover damages for injury to her means of support, and filed her declaration in such suit, alleging that said Clarence Green was the keeper of a dramshop; that said Green sold and gave intoxicating liquors to her husband, which liquors, in whole or in part, caused the said William J. Garrity to become habitually intoxicated, and in consequence of such intoxication, he wasted and squandered his money and failed and neglected to support and maintain defendant in error; that summons was issued and served on said Clarence Green; that he failed to appear and that his default was entered; that a jury was empaneled, an *ex parte* hearing had and a verdict returned against said Clarence Green finding him guilty and assessing damages in behalf of defendant in error and against said Green in the sum of $1,500, and that judgment was rendered on the verdict.

The bill further alleges that plaintiffs in error, Emil Eiger, Oscar S. Eiger and Joseph Eiger, are the owners of the premises which were occupied by said Clarence Green for the sale of intoxicating liquors, and that said plaintiffs in error leased said premises to, and knowingly permitted said building and premises to be used and occupied by said Clarence Green, for the sale of intoxicating liquors.

The bill prayed for a decree ordering the sale of Eiger's property wherein the dramshop was located for the purpose of satisfying the judgment so recovered by defendant in error against Clarence Green.

Plaintiffs in error were not made parties to the litigation between Delia Garrity and Clarence Green, had no knowledge of the claims of defendant in error or the rendition of the judgment in her behalf until the bill was filed seeking to sell their property to satisfy the judgment which defendant in error recovered against Clarence Green.

A general and special demurrer was filed to the bill by plaintiffs in error, alleging, among other things, that Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois, being the Act governing dramshops and which is the section of the statute relied upon by defendant in error in her bill of complaint, as giving her a right to sell plaintiffs in error's property to satisfy the judgment which she recovered against Clarence Green, deprives plaintiffs in error of their property without due process of law and is repugnant to that part of the Constitution of the State of Illinois contained in Section 2, Article 2 of the Constitution of the State of Illinois of 1870, which is as follows, to wit:

> "No person shall be deprived of life, liberty or property, without due process of law."

And that said Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois deprives plaintiffs in error of their property without due process of law, and is repugnant to that part of the Constitution of the United States contained in Sec-

tion 1 of the Fourteenth Amendment to the Constitution of the United States, which is as follows, to wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The demurrer was overruled, and the plaintiffs in error having elected to stand by their demurrer, the bill was taken as confessed and a decree was rendered in accordance with its prayer.

From that decree an appeal was prosecuted to the Supreme Court of the State of Illinois, which court affirmed the decree of the Circuit Court of Cook County, and this writ of error is prosecuted for the purpose of reviewing the decision of the Supreme Court of the State of Illinois in affirming that decree, on the ground that Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois, known as the "Dramshop Act," is repugnant to that part of the Constitution of the United States hereinbefore cited.

SPECIFICATIONS OF ERROR RELIED UPON.

1. The judgment of the Supreme Court of the State of Illinois deprives plaintiffs in error, and each of them, of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The judgment of said court denies to plaintiffs in error, and each of them, the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Illinois erred in holding that Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois, if enforced, will not deprive plaintiffs in error, and each of them, of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. Said court erred in holding that said Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois, if enforced, will not deny them, and each of them, the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of Illinois erred in not reversing the judgment and decree of the Circuit Court of Cook County.

6. The said court erred in affirming the judgment and decree of the Circuit Court of Cook County.

BRIEF.

I.

SECTION 10 OF CHAPTER 43 OF THE REVISED STATUTES OF THE STATE OF ILLINOIS IS UNCONSTITUTIONAL, IN THAT IT DEPRIVES PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, SINCE IT SEEKS TO MAKE THE PROPERTY OF PLAINTIFFS IN ERROR LIABLE FOR THE PAYMENT OF A JUDGMENT AGAINST A THIRD PERSON IN A PROCEEDING IN WHICH PLAINTIFFS IN ERROR WERE NOT MADE PARTIES AND HAD NO KNOWLEDGE OR NOTICE OF ANY ALLEGED UNLAWFUL ACTS COMMITTED BY SUCH THIRD PERSON.

Cobleigh v. *McBride*, 45 Ia. 116.

Myers v. *Kirt*, 64 Ia. 27.

State v. *Kelly*, 151 Ia. 264.

United States v. *Two Gallons of Whisky*, 213 Fed. 986.

Buckham v. *Grape*, 65 Ia. 535.

Section 10 of Chapter 43 of the Revised Statutes of the State of Illinois is as follows:

> "For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole

or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied, as aforesaid: *Provided*, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

II.

SECTION 10 DOES NOT PROVIDE FOR A LIEN AGAINST LESSOR'S PREMISES. THIS STATUTE MUST BE CONSTRUED LIBERALLY, SO AS TO AFFORD PROTECTION TO THE PROPERTY RIGHT OF ALL PARTIES UNDER OUR LAWS AND THE CONSTITUTION.

Bell v. *Cassem*, 158 Ill. 45.

Gaby v. *Hankins*, 86 Ill. App. 529.

Buckham v. *Grape*, 65 Ia. 535.

III.

SECTION 10 OF CHAPTER 43 OF THE REVISED STATUTES OF THE STATE OF ILLINOIS IS UNCONSTITUTIONAL, IN THAT IT DEPRIVES THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, BECAUSE IT DENIES THEM A HEARING IN THE PROCEEDING TO RECOVER A JUDGMENT FOR THE SATISFACTION OF WHICH PLAINTIFFS IN ERROR'S PROPERTY IS TO BE SOLD.

Gilmore v. *Sapp*, 100 Ill. 297.

Assets Adjustment Company v. *Atkinson*, 180 Ill. App. 296.

Hultberg v. *Anderson*, 252 Ill. 607.

Hovey v. *Elliott*, 167 U. S. 409.

Terrell v. *Allison*, 88 U. S. 289.

IV.

SECTIONS 9 AND 10 OF CHAPTER 43 OF THE REVISED STATUTES OF THE STATE OF ILLINOIS MUST BE CONSIDERED AND CONSTRUED TOGETHER, OTHERWISE THAT PART OF SECTION 9 GIVING A RIGHT OF ACTION AGAINST THE DRAMSHOP KEEPER AND OWNER, SEVERALLY OR JOINTLY, IS NUGATORY.

Black on Interpretation of Laws, page 61.

Sutherland on Statutory Construction, 2d Edition, Vol. 2, p. 731, also page 1019.

Illinois Central R. R. Company v. *City of Chicago*, 138 Ill. 453.

Wabash R. R. v. *Binkert*, 106 Ill. 298.

Hogan v. *Akin*, 181 Ill. 448.

Section 9 of Chapter 43 of the Revised Statutes of the State of Illinois is as follows:

"Every husband, wife, child, parent, guardian, employer or other person, wo shall be injured in person or property, or means of support, by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor under this Act, shall be paid either by such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors, shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this Act may be by any appropriate action in any of the courts of this state having competent jurisdiction."

V.

THE POLICE POWER OF THE STATE JUSTIFIES MEASURES FOR THE PROTECTION OF THE HEALTH, WELFARE AND MORALS OF THE PEOPLE, BUT ITS EXERCISE MUST NOT INVADE FUNDAMENTAL RIGHTS SUCH AS THE RIGHTS OF PRIVATE PROPERTY OR OF PERSONS.

People v. *Booth Fisheries Co.*, 253 Ill. 423.

Chicago v. *P. C. C. & St. L. Ry. Co.*, 244 Ill. 220.

Ruhstrat v. *The People*, 185 Ill. 133.

Lake View v. *Rose Hill Cemetery Co.*, 70 Ill. 191.

23 Cyc. page 82.

State of West Virginia v. *Gilman*, 33 W. Va. 146.

ARGUMENT.

I.

SECTION 10 OF CHAPTER 43 OF THE REVISED STATUTES OF THE STATE OF ILLINOIS IS UNCONSTITUTIONAL, IN THAT IT DEPRIVES PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, SINCE IT SEEKS TO MAKE THE PROPERTY OF PLAINTIFFS IN ERROR LIABLE FOR THE PAYMENT OF A JUDGMENT AGAINST A THIRD PERSON IN A PROCEEDING IN WHICH PLAINTIFFS IN ERROR WERE NOT MADE PARTIES AND HAD NO KNOWLEDGE OR NOTICE OF ANY ALLEGED UNLAWFUL ACTS COMMITTED BY SUCH THIRD PERSON.

The record in this case presents for the decision of this court the question whether plaintiffs in error's real estate can be sold to satisfy a judgment recovered against Clarence Green, the lessee of plaintiffs in error, a dramshop keeper, for alleged violations of the Dramshop Act of the State of Illinois.

The answer to the question depends upon the construction of Sections 9 and 10 of Chapter 43 of the Revised Statutes of Illinois (Dramshop Act).

Section 10 relied upon by defendant in error deprives plaintiffs in error of their property without due process of law, and hence is repugnant to the Constitution of the United States and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

"All persons born or naturalized in the United

States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The sale of liquor is a lawful act in the State of Illinois, likewise the leasing of premises for the sale of liquor, but when a dramshop keeper sells or gives away to another sufficient liquor so that he becomes intoxicated, then an unlawful act has been committed, and Sections 9 and 10 of the Illinois Dramshop Act, construed together, declare the dramshop keeper and the owner of the premises liable in damages.

Of course, no one can be held for damages unless the damages are assessed according to law and unless summons is issued and the persons charged with the responsibility for the violation of the rights alleged have been sued according to law and have their day in court.

Section 9 gives the right of action against the dramshop keeper and the owner of the premises jointly or severally. In the case at bar defendant in error elected to pursue her remedy against the dramshop keeper *alone*, and now seeks to burden the property of the landlord wherein the dramshop was conducted, with the payment of the judgment against the dramshop keeper, notwithstanding the fact that the landlord was not made a party defendant to the action brought against the dramshop keeper.

Plaintiffs in error's act in renting the premises

was lawful, and as long as the dramshop keeper did nothing unlawful plaintiffs in error could not be held liable. It was not until the dramshop keeper sold or gave away too much liquor to defendant in error's husband that his prior lawful act became unlawful.

Can it be possible that our law should declare to the owner of the premises, that because his lessee committed an unlawful act in the sale of liquor to an intoxicated person, without his knowledge, consent or connivance, that he shall be held liable and *his property taken and seized to pay a judgment* of which he knows nothing—a judgment rendered in a proceeding without notice to him and *to which he was not a party?*

A careful reading of Section 9 leads one to the conclusion that the legislature intended that notice of either unlawful sales or unlawful giving away of liquor to an intoxicated person should be given to the owner of the premises, for we find in the closing paragraph of Section 9 the following language:

> "And the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place."

May we ask how and under what circumstances the lessor (owner of premises) shall forfeit all rights of the lessee or tenant under any lease upon the premises where such unlawful sale or giving away shall take place, unless the owner of the premises in some manner receives notice of the violation of the statute on the part of the dramshop keeper? Unquestionably the legislature had in mind the protec-

tion of the lessor, to the end that when notice of the unlawful acts of his lessee is given to him he can terminate the lease, as provided by the section, thereby saving himself from prosecutions on account of the unlawful acts of his lessee.

In the case of *Cobleigh* v. *McBride*, 45 Ia. 116, the court said at page 118:

> "In order that a judgment for a violation of any of the provisions of the chapter relating to intoxicating liquors may be a lien upon the premises in which the unlawful act is done, owned by a third party, such person should have knowledge of and assent to the unlawful act on account of which the judgment is recovered. The special finding in this case does not show that McGavern had such knowledge or that he gave such assent. It did not authorize the declaring of the judgment a lien upon his premises."

So in *Myers* v. *Kirt*, 64 Iowa 27, the court said at p. 31:

> "To have had knowledge of and given his consent to the unlawful use of his property, the owner must not only have known that the sales were made therein, but he must also have known the particular fact or circumstance which rendered the sales unlawful. It cannot be said that the premises were occupied and used for that purpose with his knowledge and consent by the person selling intoxicating liquors contrary to law, unless he had knowledge of the fact which rendered the sales unlawful. But the instruction in question holds that the property would be liable, if Reckermire knew simply of the fact of the sales therein, and gave his consent to such sales. Under it the judgment against Kirt may be made a lien on the property, even though Reckermire had no knowledge that the sales were made in violation of law, and never gave his consent to an unlawful use of his property.

> In this respect the instruction is erroneous, and the judgment of the circuit court must be reversed."

In *State* v. *Kelly*, 151 Iowa 264, the court said at p. 266:

> "In the first of the cases just cited at p. 266 (*Polk County* v. *Hierb*, 37 Ia. 361), it is said: 'Not all property used for the unlawful sale or manufacture is liable for fines or judgments against the manufacturer or seller, but such only as is so used with the consent or knowledge of the owner. Before the property can be made so liable, it must be established as a fact that the property was so used with the owner's knowledge or consent. True, the statute does not provide the manner in which this fact is to be made to appear, and it is not necessary that it should do so. It is sufficient that the existence of this fact is made a condition precedent to the liability of the property, and that the statute does not provide that the property shall become liable without a judicial determination that the fact exists.' This was the interpretation put upon the statute for the purpose of meeting the objection that it provided for the taking of private property without trial, and showing that it was not in conflict with the constitutional provisions that no person shall be deprived of his property without due process of law; and such interpretation has been consistently adhered to as indicated in the cases already cited."

There is nothing in this record which shows that plaintiffs in error had any knowledge whatever that their tenant was making unlawful sales, nor is it contended that they had such knowledge, and hence, in view of such facts, it would be taking the property of plaintiffs in error without due process of law to compel them to pay a judgment recovered against Green in favor of defendant in error.

In the case of *Buckham* v. *Grape*, 65 Iowa 535,

the court, after a thorough analysis of the statute, says:

> "But it is said that the statute provides that the lien shall be established, for 'judgments rendered against any person for any violation' of the statute, on the property in which the liquor was sold with the knowledge and consent of the owner. Code, Sec. 1558. The statute is silent as to whether the property-owner must have notice or knowledge of the judgment or not; and, if construed literally, it would cover a judgment rendered by default, or one of which he did not have the slightest knowledge until the attempt is made to enforce it."

(The court will bear in mind that in the case at bar the judgment was rendered by default and plaintiffs in error had no notice of the pendency of suit or rendition of the judgment until an attempt was made to collect it.)

> "*We think the statute should be construed with reference to universally recognized legal principles. It cannot be presumed that the general assembly intended that a person's property should be taken or appropriated to the payment of a judgment which he had no opportunity of contesting.*
>
> *To give such a construction to the statute would, in effect, deprive a party of his property without due process of law. Such a statute would be in conflict with the constitution of the United States and of this state.*
>
> It is evident, we think, that it was the intention of the general assembly that in actions brought by a wife for a sale to her husband of intoxicating liquors, she could if she saw proper, make the owner of the property a party to the action, and therein try, and have determined, all questions necessary to enable the plaintiff to recover and establish a lien on the property in which the liquor was sold. This court has in effect so held in the cases above cited." (The italics are ours.)

Delia Garrity, defendant in error herein, could, if she saw fit, have made plaintiffs in error parties defendant to her action, and have determined all questions necessary to enable her to recover and establish a lien on plaintiffs in error's property in which the liquor was sold; but, to hold that she can confiscate plaintiffs in error's property in payment of a judgment recovered against Clarence Green, without any notice whatsoever to plaintiffs in error of the pendency of such cause of action, or opportunity to defend their rights, is well-nigh revolutionary.

The Supreme Court of Iowa, the only state which has a statute substantially identical with the statute in Illinois, after careful consideration and after a rehearing and a re-argument, decided that the owner's property could not be confiscated under its statute unless the owner was joined as party defendant or had his day in court and was given the fullest opportunity of asserting his rights; and the only time the Illinois court had occasion to pass upon the question was in the case of *Wall* v. *Allen*, 244 Ill. 456, and in that case we find the court grounding its decision in part upon the statement that "the defendant is not deprived of his property without due process of law *when he is permitted to controvert the facts upon which the lien rests.*" (Our italics.)

The learned justice of the Supreme Court of Illinois, in writing the opinion in the case at bar, undertakes to explain that language by stating that those facts are, that he "shall rent or lease to another his building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquor, or shall knowingly permit the same to be so used or occupied, and that a judgment has been recovered

against the person occupying the building or premises for damages in consequence of the sale of intoxicating liquor on his premises."

We submit that the facts upon which the lien (if there is a lien) rests, is not the fact as to whether or not the judgment was recovered, but whether or not the person bringing the action had a cause of action or was entitled to recover under the statute in question.

And we submit that there is no provision in the sections involved which accords plaintiffs in error the right to controvert the facts in a case brought against the dramshop keeper alone.

In the case at bar the sale of plaintiffs in error's property has been decreed without according them the right to controvert the facts upon which defendant in error recovered her judgment against the dramshop keeper, Green.

II.

SECTION 10 DOES NOT PROVIDE FOR A LIEN AGAINST LESSOR'S PREMISES. THIS STATUTE MUST BE CONSTRUED LIBERALLY, SO AS TO AFFORD PROTECTION TO THE PROPERTY RIGHTS OF ALL PARTIES UNDER OUR LAWS AND THE CONSTITUTION.

Nowhere in the act is it expressly stated that the judgment, when recovered against the tenant, shall be a *lien* against the premises of the landlord.

Section 10 provides that in case any person shall rent to another, premises to be used for the sale of intoxicating liquors, that such premises *so used or*

occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such premises.

We submit that if the person maintaining an action under the Dram Shop Act elects not to sue the landlord, under Section 9, either severally or jointly with the dramshop keeper, and subsequently undertakes to subject the landlord's real estate to the payment of the judgment in accordance with the provisions of Section 10, the court must construe Section 10 in conjunction with Section 9, with a view of preserving the rights of all parties, giving them their day in court and doing justice to all.

This can only be accomplished by allowing the landlord, when first apprised of the action as in the case at bar, to make any defense going to the merits of the case in which the judgment is recovered against his lessee,—that is, giving him his day in court,—and this can only be done if the plaintiff in the bill seeking to sell the landlord's real estate sets out all of the facts giving rise to the original cause of action and proves all of these.

In a proceeding under Section 10, defendant in error should be required to allege and prove all of the facts with regard to her cause of action against the dramshop keeper, the kind and amount of damages suffered, etc. This must be done so that plaintiffs in error can require proof of the cause of action and contest the right of recovery and the amount of damages.

Any other construction must of necessity result in plaintiffs in error being deprived of their property without an opportunity of negativing defend-

ant in error's claim and without compelling defendant in error to prove the *bona fides* of her cause of action.

The following states have statutes which give a cause of action to persons, by reason of injuries caused by the intoxication of others:

Alabama,
Illinois,
Indiana,
Iowa,
Kansas,
Missouri,
Nebraska,
Maine,
Massachusetts,
Michigan,
New York,
Ohio,
Pennsylvania,
Tennessee,
West Virginia,
Wisconsin,
Idaho,
Kentucky,
Minnesota,
New Hampshire,
New Mexico,
North Carolina,
South Carolina.

The states of the Union not mentioned herein, so far as we are advised, have no statutes giving the right of civil damages for injuries suffered by reason of the intoxication of others. Most of the statutes in the states named give actions only against the dramshop keeper. The statutes of West Virginia, Indiana, Maine, New York, Ohio, Iowa and Illinois give actions against the landlord, as well as against the tenant.

In New York, Ohio, Pennsylvania, Wisconsin, California, Idaho, Kentucky, Missouri, Nevada, New Hampshire and New Mexico, the saloonkeeper is not liable civilly unless a notice has first been served requesting him to stop the sale of liquor to the person upon whom the plaintiff is dependent. In New York, Ohio, Pennsylvania and Wisconsin, the landlord cannot be held liable unless a similar notice is served upon him.

Only Iowa, Ohio and Illinois make the judgment recovered against the tenant a lien, without further suit, against the premises occupied by the lessee; but the Ohio statute provides for a notice to be served on the dramshop keeper or the owner of the premises not to sell liquor to a certain person.

This leaves the statutes of only two states to consider, in passing on the identical question at bar, Illinois and Iowa.

The Illinois court passed upon the question only once, prior to the decision in the case at bar, in the case of *Wall* v. *Allen*, 244 Ill. 456, Farmer, C. J., and Cooke, J., dissenting.

The court, speaking through Mr. Justice Cartwright, said at page 462:

> "He (the lessor) had his election to lease his premises for the sale of intoxicating liquors or to devote them to some other use, and to either permit them to be used for that purpose or to prevent such use, and we do not see how it can be said that he is deprived of his property without due process of law *when he is permitted to controvert the facts upon which the lien rests.*" (Our italics.)

That language would lead one to believe that the learned justice writing the opinion found that Section 10 of the statute made the judgment a lien. Such is not the statute. The language is, the "premises so used or occupied shall be held liable."

We submit that the plaintiffs in error are not permitted to controvert the facts upon which the lien rests, and we submit that the statute does not make the judgment a lien. Plaintiffs in error were denied the right to controvert the facts in the case at

bar. The only question at issue in the case at bar is, did Delia Garrity recover a judgment against Clarence Green under the Dram Shop Act? If so, defendant in error insists she has the right to sell plaintiffs in error's property to satisfy that judgment, and we insist that the sale of plaintiffs in error's property for the purpose of satisfying that judgment is depriving plaintiffs in error of their property without due process of law.

The Iowa statute is practically identical with the Illinois statute, and the decisions of the Supreme Court of Iowa construing that statute should have great weight.

Section 2418 of the Iowa Annotated Code gives to the wife, child, etc., who is injured in property or person or means of support by an intoxicated person, an action against the person selling the liquor.

Section 2422 provides:

> "For all fines and costs assessed or judgments rendered of any kind against any person for a violation of any provision of this chapter, * * * the personal and real property, * * * as well as the premises and property, personal or real, occupied and used for the purpose, with the knowledge of the owner or his agent, * * * shall be liable and the *same shall be a lien on such real estate until paid.*"

Note, that the statute expressly states that the judgment shall be a lien on the real estate (**Illinois statute does not go so far, but merely says that the "premises so used or occupied shall be held liable for and may be sold to pay any such judgment**"); but this did not prevent the Iowa Supreme Court from liberally construing the statute so as to protect the property rights of all concerned.

The statute was thoroughly reviewed in the case of *Buckham* v. *Grape*, 65 Ia. 535, where the court said at page 538:

> "A rehearing was allowed in this case upon the petition of plaintiff, and the cause has again been submitted upon a re-argument. We adhere to the conclusions reached in our former opinion, and are now unable to add anything which will give additional strength to the arguments we have presented in their support. I may say for myself that from the first I had grave doubts of the correctness of our decision. *I was brought to concurrence in it by the consideration of the settled policy of the law, which will deprive no man of property or rights without giving him the fullest opportunity to defend them.* A judgment, therefore, ought not to be enforced as a lien upon property until the owner, either by himself or his privies, has had an opportunity to resist it. It should not be regarded as evidence of liability of the property, if the owner has not been a party to the proceeding in which it was rendered. * * * The position of the former opinion, that the statute should be construed in harmony with the doctrines of the law which secures the right of the owner to defend and protect his property, seems to remove these difficulties; but I am brought to full assent to the conclusion we have adopted by the consideration that the property owner could have been made a party to the original action, and the rule requiring him to be joined therein in order to bind him by the judgment would, in all cases, operate so as to secure the ends of justice, and in no case work hardship. Before his property can be reached under the statute, an issue must be joined and tried involving his knowledge of the sales of intoxicating liquors upon his property. These issues may be tried in the original case. Why not determine all the issues which the property owner may raise, in the action against the vendor, the property owner be-

ing joined therein? The liability of his property could be determined in one case, instead of two, if he should be separately sued. If he be made a party to the action, he would be bound by the judgment, and, without further proceedings, it could be declared a lien upon his property. By this practice justice would be done to all parties, and they would be relieved of litigating two cases, when all their rights could be and ought to be settled in one. I think the rule we adopt will not only promote the ends of justice, but will lessen the expense and hasten the decision of controversies of the character of the one before us." (Italics are ours.)

III.

SECTION 10 OF CHAPTER 43 OF THE ILLINOIS REVISED STATUTES IS UNCONSTITUTIONAL, IN THAT IT DEPRIVES THE PLAINTIFFS IN ERROR OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, BECAUSE IT DENIES THEM A HEARING.

It is a fundamental rule of law that somewhere in the course of a proceeding the defendant is entitled to a hearing and an opportunity to make his claim and present his defense. This right to a hearing is a fundamental precept of our form of government, and to deprive one of this right is to deprive one of his property without due process of law.

In *Gilmore* v. *Sapp*, 100 Ill. 297, the court said:

"Again, even if the commissioner had the power, he could not exercise it until Swisher had actual or constructive notice of the proceeding or entered his appearance, and the bill charges and the default confesses there was no such notice. *It is a fundamental principle that before a person can be deprived of a right by judicial sentence, he must have notice and reasonable opportunity to be heard in defense of his*

rights. This is so elementary that it must be known to all persons in the profession, if not to all others." (Italics are ours.)

And again in *Assets Adjustment Company* v. *Atkinson*, 180 Ill. App. 296, the court said at p. 298:

"The difficulty with the contention is that said rule is inconsistent with another provision of the act and ignores the substantive right of every litigant to have a judicial determination of his rights, when properly put in issue, by 'inquiry before judgment, hearing before condemnation.' In the *Russell* case, *supra*, the court said: 'The constitutional guaranty of due process of law, without which no person may be deprived of his property, requires inquiry before judgment, hearing before condemnation.' The contumacy of a party in disobeying the order of a court may justify his punishment for contempt, but not the deprivation of his civil rights or the taking of his property and giving it to another. The judgment here, though purporting to be a judicial determination of the rights of the parties, is, in fact, only an arbitrary declaration of the judge having no reference to such rights; * * * and it is a principle of fundamental justice that, however plenary may be the power to punish for contempt, no court, having obtained jurisdiction of a defendant, may refuse to allow him to answer, refuse to consider his evidence and condemn him without a hearing because he is in contempt of court."

And again in *Hultberg* v. *Anderson*, 252 Ill. 607, the court said (p. 615):

"Under the due process clause of the Constitution a party is not only entitled to notice of the proceeding against him, *but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if, after he appears, the court arbitrarily refuses to hear him? A judgment pronounced without any*

judicial determination of the facts which alone can support such judgment, is merely the arbitrary edict of the Judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons." (Our italics.)

The same principles have been announced by this court in *Hovey* v. *Elliott*, 167 U. S. 409, the court saying:

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

"In *Galpin* v. *Page*, 18 Wall. 350, the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he had been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered.'"

And again, in *Terrell* v. *Allison*, 88 U. S. 289, this court said at p. 292:

> "It is a rule old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in court; that is, without being duly cited to answer respecting them, and being heard or having opportunity of being heard thereon."

In the case at bar, plaintiffs in error's first and only intimation that any judgment existed for which their premises were liable or could be held liable under the law, was a summons notifying them of the bill which had been filed praying for a decree of sale of their property to satisfy the judgment. No knowledge came to them that their tenant was doing anything unlawful; they received no notice that a suit had been instituted against Clarence Green, although the suit was begun June 18, 1912, and a judgment recovered against Green October 2, 1914; they were afforded no opportunity to contest the merits of the case. For all one knows, the judgment may have been recovered by fraud or connivance of the parties to it, or perhaps by the negligence of Green, the dramshop keeper, in not defending the suit, because, being financially irresponsible, he did not care.

The demand of defendant in error is but a travesty on justice, for she brings plaintiffs in error into court for the first time and asks that their property be sold to satisfy a judgment of which they had no knowledge and recovered in a proceeding in which she affords them no opportunity to defend their rights, protect their property or deny her right to a recovery upon the merits of the allegations of her complaint. Such a proceeding denies plaintiffs in error the rights guaranteed to them under our Con-

stitutions, both State and Federal, and deprives them of their property.

The statutes in other states hereinbefore referred to, except that of the State of Iowa, throw no light upon the question under consideration.

The New York statute does not authorize the judgments recovered against the saloonkeeper to be a lien against the premises of the landlord, but simply creates a cause of action against the property owner. Hence, what the court says about its statute being constitutional, does not affect the validity of the statute in Illinois.

In Kansas the statute subjects the premises leased or occupied for the sale of intoxicating liquors to a lien for fines and costs assessed against the occupant. Note that this is totally different from subjecting the premises to a lien for a judgment recovered in a civil suit. A fine for violating a statute is a sort of criminal proceeding and is analogous to the statutes in Illinos with regard to gambling, so that what the court in Kansas says with reference to the constitutionality of its statute can have no weight in considering the constitutionality of the statute in question in the case at bar.

Illinois has a statute, Sections 132 and 133 of the Criminal Code, similar in some respects to Sections 9 and 10 of the Dram Shop Act, but those sections cannot be considered as an analogy in construing the statute involved in the case at bar, since Sections 132 and 133 refer to a thing unlawful in itself—that is, gambling—whereas it is lawful to sell liquor or to lease premises for its sale. Section 132 gives a right to one who has lost money at gaming to sue

and recover it back, and if he does not do this within six months, then any person may sue and recover treble the amount. Section 133 provides that when one shall lease to another premises to be used or occupied as a gaming house, or shall knowingly permit the same to be used and occupied for such purpose, then such building or premises shall be held liable for and may be sold to pay any judgment recovered under Section 132.

In construing these sections, the Illinois court, in *Wing* v. *Little*, 267 Ill., p. 20, said:

> "The liability created by the statute is for the amount of the judgment, and where a judgment had been obtained in an adversary proceeding and without fraud or collusion, all questions are foreclosed in the proceeding to subject the premises to the payment of such judgment except the question whether the owner of the premises had knowingly permitted them to be used for the unlawful purposes prohibited by the statute."

The court thus holds that in the suit to subject the premises to a lien, all questions are foreclosed except the question as to whether or not the owner of the premises had knowingly permitted them to be used for the unlawful purposes prohibited by the statute. It must be noted that we are here dealing with something unlawful. Conducting a gambling house is unlawful and renting premises for such a purpose is likewise unlawful and wrongful *per se*. Hence, when the court adopts a strict rule and says that in such case the judgment obtained in the original proceeding binds absolutely the property owner, it is not without reason. Gambling is an undesirable situation; rigorous action is necessary to

abolish it, and the court is justified in going far in dealing with a state of facts unlawful and declared by our statute to be criminal.

But a ruling under such a statute is not to be considered in determining the questions at issue in the case at bar. The sale of liquors is not unlawful. It is not criminal or unlawful to rent premises for the sale of intoxicating liquors, and when in this case the plaintiffs in error rented their property for use as a dramshop, they were making a proper and lawful use of their property.

No court would be justified in arbitrarily saying in such a situation that one's property can be taken to satisfy a judgment wherein such party had no knowledge of the original suit or an opportunity to defend it. The courts must so construe the statute as to safeguard the rights of all parties, and this can only be done by refusing to deprive plaintiffs in error of their property without a day in court and by declaring that they shall not be divested of their property without giving them an opportunity to contest and require proof of the original cause of action.

The adoption of such a construction will not impose a hardship or injustice on anyone. Defendant in error, if she has a meritorious cause of action, can join the landlord with the tenant in the original suit. This preserves her rights against the premises and plaintiffs in error are given an opportunity to make their defense. This, in fact, is the very rule adopted by the Iowa Supreme Court under a statute similar, if not identical to the one in Illinois.

IV.

SECTIONS 9 AND 10 OF CHAPTER 43 OF THE REVISED STATUTES OF THE STATE OF ILLINOIS MUST BE CONSIDERED AND CONSTRUED TOGETHER, OTHERWISE THAT PART OF SECTION 9 GIVING A RIGHT OF ACTION AGAINST THE DRAMSHOP KEEPER AND OWNER, SEVERALLY OR JOINTLY, IS NUGATORY.

Section 9 of Chapter 43 is, in part, as follows:

> "And any person owning, renting, leasing or permitting the occupation of any building or premises and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable severally or jointly with the person or persons selling or giving the intoxicating liquors aforesaid for all damages sustained."

It will be seen that this section of the statute gives the aggrieved party a right of action at law against the property owner or the dram-shop keeper, or gives him a right of action jointly against both.

Section 10 of Chapter 43 declares that:

> "In case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquor, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered which remains unpaid, or any part thereof, either before or after execution shall is-

sue against the property of the person against whom such judgment shall have been recovered."

These two sections must be considered and construed together.

If we are to say that Section 10 makes a judgment recovered against the lessee,—without notice to the lessor, without making him a party to the suit or judgment, without summons issued to him,—a lien upon his (the lessor's) property, without any action except the filing of a bill seeking to sell lessor's premises in satisfaction of such judgment rendered against his lessee, then that part of Section 9 herein quoted is nugatory, for an aggrieved party would, if such be the case, never join the lessor with the lessee in suit, nor would the lessor ever be sued alone.

Plaintiff must know in advance that the lessor, the owner of the building or premises, would contest any alleged claim for damages with vigor. Why then should any prospective litigant take this chance, when he knows that he can sue the dramshop keeper alone, with the chances of recovery against him far better than against the owner, and then having obtained a judgment against the dramshop keeper, either by default, as in the case at bar, or after contest, and without notice of any kind whatsoever to the owner of the building and without affording him any opportunity of defending himself or giving him his day in court, call upon him for the payment of the judgment recovered against the dramshop keeper, and, upon his failure to pay the same, sell his real estate for the purpose of satisying such judgment?

It is fair to assume that the dramshop keeper, with meager income and little property, would pay little

attention to a suit started against him, particularly if he is cognizant of the fact that the owner of the building wherein his saloon is situated can be called upon to pay whatever judgment may be rendered against him. A saloon keeper sued under such circumstances, probably would not go to the expense of employing counsel to defend such suit. The litigant, even if he recovered judgment, probably could not or would not attempt to satisfy it out of the goods and chattels of the dramshop keeper. What is the result? The saloon keeper does not contest the action. He lets it go by default, and the litigant recovers a judgment to which he may or may not be entitled.

In the case at bar the saloon keeper failed to appear in the suit or make any defense, and defendant in error recovered her judgment by default.

It is inconceivable that the Legislature intended, by the passage of Section 10, to give to the aggrieved party a lien on the lessor's real estate and a right to sell the same to satisfy such lien, without giving the lessor his day in court and an opportunity to defend the action contemplated in Section 9. To so hold, would mean that the Legislature, when it passed the Act, intended a part of Section 9 to be a mere mass of useless words. Those words included in Section 9 which give a remedy against either the dramshop keeper or the owner, severally, or against both of them jointly, meant that the parties suing could elect which one to sue, but in either event, notice would be given of the pendency of the action.

Section 10 cannot be construed as though it were standing alone, but must be read in connection with and as a part of Section 9 of the Act. To hold other-

wise would be to deprive an owner of his real estate without due process of law; subject his property to the payment of his tenant's debts without notice to him and without making him a party to the proceeding; hold him responsible for his tenant's failure to defend his suit and make him liable for a judgment that might, perchance, be rendered by reason of collusion between the tenant and the litigant.

The landlord would have no means of knowing whether intoxicating liquors were being unlawfully sold or given away, whether the suit was brought in good faith, or whether the judgment was the result of a fraudulent conspiracy between the tenant and the plaintiff. He would have no opportunity of defending the action or even of knowing that any action was brought.

In the case at bar, the suit was commenced against the dramshop keeper, Green, more than two years prior to the filing of the bill in this case to subject plaintiffs in error's real estate to the payment of the judgment recovered in such suit against Green, and plaintiffs in error (lessors) had no means of knowing of the pendency of such suit or of defending the same.

Black on Interpretation of Laws, says at page 61:

> "It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and *which*

would tend most completely to secure the rights of all persons affected by such legislation. And so, where an action is brought under a particular section of a statute, which, considered alone, is in conflict with the constitution, and it appears that such statute as a whole, is in harmony with the constitution, such construction should be given to the particular section as will harmonize with the statute, when considered in the light of the whole enactment."

Sutherland on Statutory Construction, 2d Edition, Volume 2, page 731, says:

"*Some effect, if possible, to be given every word, clause and sentence.* It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. Statutes should be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another."

And at page 1019 we find the following:

"If a statute creates a liability where otherwise none would exist, or increases a common law liability, it will be strictly construed."

In the case of *Illinois Central Railroad Company* v. *City of Chicago*, 138 Ill. 453, this court said at p. 459:

"It is practically conceded by counsel for appellee, as it must be, that the right and power of the city to extend its street over, upon or across the particular tract of land in question, are measured by the clause last quoted. It is a familiar rule that statutes should be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous. It is manifest that if power to extend the streets of a city over and across a railroad, its right of way and land is to be

> exercised in the same manner and the right acquired in the same way as it is in extending streets over all other property under the general power, then Clause 89, so far as it relates to street extension, is superfluous."

In *Wabash R. R.* v. *Binkert*, 106 Ill. 298, this court said at p. 306:

> "It is not unfrequent in the interpretation of statutes and written instruments that the plain, literal reading of language is departed from where it s requred to avod an absurd consequence or to carry out the manifest intention."

Again, in *Hogan* v. *Akin*, 181 Ill. 448, this court said:

> "It is true we cannot disregard a provision of that kind appearing to be within the intention of the lawmakers, but the purpose of construction is to find and give effect to such intention, and a thing which is within the letter is not within the statutes unless within such intention. In seeking for such intention, we are to consider not only the language used by the legislature, but also the evil to be remedied and the object to be attained."

In the light of these authorities, what weight can be given to the wording of Section 9, making the lessors jointly or severally liable, if the position contended for by defendant in error is sound? Defendant in error insists that Section 10 *makes the lessors liable, without suit and without notice, for the payment of a judgment against their lessee.* If this be so, is not the provision of Section 9 making lessor liable *and providing for suit against him,* superfluous and meaningless? The dominant idea of the statute was to make not only the saloonkeeper liable, but also his landlord, so that the latter will, in

a certain sense, be a guardian over the dramshop keeper and a sort of guarantor of the good conduct of his lessee; but we insist that it was never contemplated that the landlord should be held liable for the payment of a judgment *rendered against his lessee in a proceeding in which he was denied his day in court or his opportunity of defending or contesting the merits of the plaintiff's cause of action.*

Our position is, that when, for the first time, the lessor of premises wherein liquors are sold is brought into court to answer a claim for damages, he should, under our Constitution and our laws, have a right to his day in court, to contest the merits of the claim and the amount of damages, and this right should exist at all times, whether it be in a joint action with the lessee or in a suit at law against the lessee alone, or where, after judgment is obtained against the lessee, it is sought to subject the lessor's premises to the payment of the judgment. Only by so holding, can effect be given to both Section 9 and Section 10 of the act in question.

This proceeding seeks to sell the property of plaintiffs in error, to satisfy a judgment recovered against Green, and defendant in error's position is that, under the statute, the only question open to consideration so far as plaintiffs in error's rights are concerned, is the question as to whether or not a judgment was recovered by defendant in error against Clarence Green in a proceeding to which plaintiffs in error were strangers.

V.

THE POLICE POWER OF THE STATE JUSTIFIES MEASURES FOR THE PROTECTION OF THE HEALTH, WELFARE AND MORALS OF THE PEOPLE, BUT ITS EXERCISE MUST NOT INVADE FUNDAMENTAL RIGHTS SUCH AS THE RIGHTS OF PRIVATE PROPERTY OR OF PERSONS.

Counsel for defendant in error will attempt to justify and sustain Section 10 of the Dram Shop Act under the police power. The police power does not give such arbitrary power as counsel contends for.

It is true that the Legislature may, if it deem fit and necessary, prohibit absolutely the sale of intoxicating liquors within the confines of the State and that it may do this by virtue of its police power. It may on the other hand allow the sale of liquor everywhere unrestrained or may impose regulations governing its sale. All the regulations one may point to as having been adopted by the Legislatures are truly "regulatory" in that they are arbitrary rules of conduct calling for mere mechanical routine in conducting the saloon business. It is true that a saloonkeeper needs a building to carry on his business and that hence it may be said that the property owner in such way assists the selling of intoxicating liquors; but his act has only an indirect bearing upon the ultimate result, that is, the injury occurring through the intoxication of persons, which is the result sought to be remedied by the statute in question.

We grant, too, that it is constitutional and within the police power for a statute to give a cause of action for civil damages to one hurt through the in-

toxication of others. Counsel for defendant in error will no doubt cite *Bertholf* v. *O'Reilly*, 74 N. Y. 509. This case merely reasserts the proposition holding in a most lengthy and thorough discussion that a statute is constitutional, which gives a CIVIL CAUSE OF ACTION AGAINST THE LANDLORD for injuries occurring through the intoxication of others, but it did NOT HOLD CONSTITUTIONAL the taking of the landlord's property to satisfy a judgment recovered not against him, but against a third party, as counsel for defendant in error will contend.

Counsel for defendant in error would have the court believe that the police power is a sort of super-power; that its exercise could never be questioned no matter how gross or unjust. There are limitations, however, upon the police power. In the case of *People* v. *Booth Fisheries Co.*, 253 Ill. 423, the court said at page 430:

> "Where the police power exists, the manner and means of enforcing it rests with the Legislature, so long as such manner and means are reasonably adapted to the purpose and *do not arbitrarily and unreasonably interfere with rights protected by the Constitution.*"

And again, in *Chicago* v. *P. C. C. & St. L. Railway Co.*, 244 Ill., at 220:

> "but the Legislature cannot under the guise of police regulation ARBITRARILY INVADE PERSONAL RIGHTS OR PRIVATE PROPERTY."

To emphasize this still further let us quote from *Ruhstrat* v. *The People*, 185 Ill. 133. The court at page 142 said:

> "The Legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination

upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment." * * * "In *Mugler* v. *Kansas*, 123 U. S. 623, it was said:

"'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution.'"

And again, in *Lakeview* v. *Rose Hill Cemetery Co.*, 70 Ill. 191, at page 197, the court said:

"Reference is made to the reserved power of the State denominated 'police power,' as affording the requisite authority. It has been said, the source of this extraordinary power may be readily recognized as flowing from the people in their organized capacity, inalienable in its character, but that it is difficult to define its boundaries or limit its operations. We are unwilling, however, to concede the existence of an indefinable power, superior to the Constitu-

> tion, that may be invoked whenever the Legislature may deem the public exigency may require it, by which a party may be capriciously deprived of his property or its use, without compensation, whether such property consists of franchises or tangible forms of property. The Constitution expressly provides the right of property shall remain inviolate, and, upon all enumerated subjects, it must constitute a limitation on the exercise of all power, no matter what its nature may be, nor whence its origin. If such was not the case, there could be no constitutional security for private rights, and the citizen would hold his property, corporeal and incorporeal, by a most uncertain tenure."

The statute here involved gives an action against the saloonkeeper or landlord for damages that may have accrued through his selling enough liquor to cause one to become intoxicated. So far, it is a good police regulation designed to safeguard the welfare of the people, but why is it necessary to say further that this judgment against the saloonkeeper alone may be satisfied by taking the property of the landlord who knows nothing of the violations by his tenant, or of the suit brought against the tenant? What possible relation has such a procedure to protecting the health, welfare or morals of the people? The statute gives an action against the landlord for damages which accrue, but we contend that the limits of the police power are overstepped when it says that his property can be taken to pay a judgment recovered, not against him, but against some other party. THIS IS INVADING PROPERTY RIGHTS OF THE PLAINTIFFS IN ERROR AND IS NOT TO BE JUSTIFIED BY VIRTUE OF THE POLICE POWER.

STATUTES PASSED TO REGULATE SALE OF LIQUOR MUST BE REASONABLE, AND WHEN THE SALE OF LIQUOR IS MADE LAWFUL DIFFERENT CONSIDERATIONS ARE APPLICABLE THAN THOSE APPLIED TOWARD A BUSINESS INHERENTLY ILLEGAL.

The State may prohibit entirely the sale of intoxicating liquors, but it has seen fit not to do so. It has provided for the licensing of dram-shops and has LEGALIZED the sale of liquor, provided a license has been properly taken out. Along with the power to license comes also the right to regulate, but having licensed the sale of liquor, the Legislature may not, just because it could have prohibited the sale entirely, enact such regulations as would be unjust and discriminatory; the regulations must be reasonable.

> "If the state allows the sale of intoxicating liquors, the legislature has power to regulate the business by such reasonable and proper restrictions and requirements as are necessary to protect the public safety, health and morals against the evils likely to result from the traffic, provided, of course, that such regulations do not contravene any provision of the constitution of the state or conflict with the constitution of the United States."
>
> 23 Cyc., p. 82.

The same principle was expressed in *State of West Virginia* v. *Gilman*, 33 W. Va. 146, the court saying:

> "But it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the State; and much less is such the case when the statute is merely claimed by its defenders to be intended for that purpose.

"The court, in its opinion in *Mugler* v. *Kansas,* says: 'The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or *is a palpable invasion of rights secured by the fundamental law,* it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' 123 U. S. 661 (8 Sup. Ct. Rep. 273).

"The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public; and, therefore, the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. *It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void.*" (Italics are ours.)

CONCLUSION.

We submit that the decree of the Circuit Court of Cook County and the decision of the Supreme Court of Illinois should be reversed, for the reasons herein outlined.

The bill does not set forth facts essential and necessary to subject plaintiffs in error's property to the payment of the judgment recovered against Clarence Green. Plaintiffs in error were not parties to the suit; no judgment was rendered against them; they were not afforded an opportunity of defending the original suit brought by defendant in error against Green, and unless this court reverses the decision of the Supreme Court of the State of Illinois, plaintiffs in error will be deprived of their property without due process of law and without having had their day in court.

Respectfully submitted,

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Solicitors for Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 143.

EMIL EIGER, OSCAR S. EIGER and JOSEPH EIGER,
Plaintiffs in Error,
vs.
DELIA GARRITY,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

ODE L. RANKIN,
SOLICITOR FOR DEFENDANT IN ERROR.

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Writ of Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

To the Honorable Justices of the Supreme Court of the United States:

STATEMENT.

Delia Garrity obtained a judgment for civil damages under Section 9 of the Dram Shop Act of Illinois (quoted in Brief of Plaintiffs in Error, page 9) against one Clarence Green, who kept a dramshop as a tenant of, and in the premises owned by and to the knowledge of plaintiffs in error, for injury to her means of support resulting from sales of liquor to her husband made upon the premises in question.

The judgment remaining unsatisfied she filed the bill in this case under Section 10 of said Dram Shop

Act (quoted in brief of Plaintiffs in Error, page 6) to subject the said property to the payment of the judgment. Plaintiffs in error demurred to the bill generally, and specially in their demurrer raised state and federal constitutional questions upon the record.

On the hearing of their demurrer, it was overruled and they elected to stand by it, and a decree *pro confesso* was entered subjecting the property involved to the payment of the judgment.

From the decree an appeal was taken to the Supreme Court of Illinois, where the decree was affirmed. The case was then brought to this court upon writ of error.

Only one constitutional question is to be answered by this court: Had the legislature of Illinois power to enact a law subjecting property of an owner to payment of a dramshop judgment against his tenant should such owner knowingly lease his premises for dramshop purposes and should sales of intoxicating liquor resulting in injury and damage be made thereon and such damage be reduced to judgment against such tenant?

The other questions argued by plaintiffs in error are questions of procedure or practice in the court of the state in which this cause originated and to decide which this court does not take jurisdiction, except to determine whether or not the due course of the law of Illinois was followed.

BRIEF.

I.

POLICE POWER OF THE STATE WHEN PROPERLY EXERCISED NOT CONTROLLED BY THE FEDERAL CONSTITUTION.

The police power of the state, when used to fix conditions upon the commerce of intoxicating liquors or other unlawful or prohibitable practices, is used in the exercise of an inherent sovereign right which our states never have ceded to the Federal Government and does not, when so exercised, conflict with the due process of law provision of the constitution.

Mugler v. *Kansas*, 123 U. S. 623.
Barbier v. *Connolly*, 113 U. S. 27.
License Cases, 46 U. S. (5 How.) 504.
Wall v. *Allen*, 244 Ill. 456.
Goddard v. *Jacksonville*, 15 Ill. 589.
Bertholf v. *Reilly*, 74 N. Y. 509.

Argument, post, page 8.

II.

The Dram Shop Act of Illinois, its purposes and the practice and procedure under it as applied to the case at bar.

Argument, post, page 11.

III.

POWER EXISTS TO FASTEN LIABILITY ON PROPERTY USED FOR DRAM SHOP PURPOSES.

Statutes providing that fines assessed for illegal sales of intoxicants and judgments obtained against third parties for damages from such sales shall be a lien upon or be satisfied by the sale of the property used as a place for the sale thereof with the consent or knowledge of the owner are not in contravention of the provision of the constitution guaranteeing against the taking of property without due process of law where provision is made that the property shall be taken after a judicial determination that the jurisdictional facts shall exist.

Polk County v. *Hierb*, 37 Ia. 361.
Marvin v. *Trout*, 199 U. S. 212.
Mullen v. *Peck*, 49 Ohio St. 447.
Hardten v. *State*, 32 Kas. 637.
Wing v. *Little*, 267 Ill. 20.
Wall v. *Allen*, 244 Ill. 456.

Argument, post, page 24.

IV.

REGULARITY OF JUDGMENTS PRESUMED.

A judgment which shows jurisdiction of parties and subject matter cannot be attacked collaterally by demurrer. Facts sufficient to avoid it must be pleaded and proven. It may be impeached by allegations, if proven, of fraud, collusion, or other overreaching.

Freeman on Judgments, Secs. 335, 336.
Wing v. *Little*, 267 Ill. 20.

Ralston v. *Wood*, 15 Ill. 159.
Housh v. *People*, 66 Ill. 178.
Nevitt v. *Woodburn*, 160 Ill. 203.
Wall v. *Allen*, 244 Ill. 456.
Swiggart v. *Harber*, 5 Ill. (4 Scam.) 364.
Voorhees v. *Bank*, 35 U. S. (10 Pet.) 472.
Ferry v. *Miltimore Car Wheel Co.*, 71 Vt. 457.

Argument, post, page 30.

V.

THE ILLINOIS RULE IS THAT A JUDGMENT IS PRIMA FACIE EVIDENCE OF THE DAMAGES IT REPRESENTS.

It is the settled practice of the courts of the State of Illinois that a judgment showing jurisdiction of parties and subject matter is, in collateral suits, *prima facie* evidence of the extent of the damages it represents, and is treated as conclusive unless facts are pleaded and proven to impeach it. Such is also the rule of the United States Courts (*Stovall* v. *Banks*, 77 U. S. (10 Wall.) 588.)

Wing v. *Little*, 267 Ill. 20.
Wall v. *Allen*, 244 Ill. 456.
Ralston v. *Wood*, 15 Ill. 159.
Housh v. *People*, 66 Ill. 178.
Nevitt v. *Woodburn*, 160 Ill. 203.

Argument, post, page 34.

VI.

DUE PROCESS OF LAW BY THE JUDICIAL DEPARTMENT. SETTLED PRACTICE OF THE PARTICULAR STATE COURTS IS DUE PROCESS OF LAW.

The settled rules of practice and procedure for the determination of cases in a given jurisdiction are binding upon litigants as part of the due process of law contemplated by the constitution.

Kennard v. *Louisiana*, 92 U. S. 480.
Turpin v. *Lemon*, 187 U. S. 51.
Walker v. *Sauvinet*, 92 U. S. 90.
Hurtado v. *California*, 110 U. S. 516.
McKee Ex Parte 19 Utah 243.
People v. *Quant*, 12 How. Pr. 89.

Argument, post, page 37

ARGUMENT.

MAY IT PLEASE THE COURT:

First. The demurrer interposed by plaintiffs in error to the bill filed by defendant in error to subject their property to the payment of a dramshop judgment recovered against their tenant who kept a dramshop on the property in question by their leave and lease raises the question whether the legislature of Illinois had the power to pass such an Act as against the provisions of the Federal Constitution guaranteeing due process of law. On this point defendant in error contends that the Act is justified under the police powers of the state and that such powers are not prohibited by any provision of the Constitution.

Second. Assuming the Act to be a proper exercise of the police power of the state, the question then arises whether the judiciary of Illinois by the procedure and practice adopted has denied plaintiffs in error of their property without due process of law. On this point, it is contended that plaintiffs in error received the due process of the law as administered in the State of Illinois and that this point is not determined by what may be or has been considered proper practice and procedure in other states, but by what has become to be the settled and proper procedure and practice in the courts of Illinois.

I.

THE POLICE POWER OF THE STATE, WHEN PROPERLY EXERCISED, NOT CONTROLLED BY THE FEDERAL CONSTITUTION.

The police power of a state, which is that power by which it enacts and provides means of enforcing legislation to "Promote the health, peace, morals, education and good order of the people," has been held to include the regulation of the intoxicating liquor traffic to the extent of total prohibition. It is a power never denied to the states by the United States Supreme Court, but on the contrary has been vigorously upheld as against all constitutional provisions urged against it.

Said Mr. Justice Grier in the License cases, 5 How. 504 (1845):

> "It is not necessary for the sake of justifying the state legislation now under consideration to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of those great evils, and all measures of restraint or prohibition necessary to effect this purpose are within the scope of that authority."

And in the case of *Mugler* v. *Kansas*, 123 U. S. 623, when considering the Kansas prohibition cases, which meant a great property loss to certain breweries, Mr. Justice Harlan said:

> "But neither the amendment (Fourteenth Amendment to the Federal Constitution), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power

> of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. * * * If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medicinal, scientific and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot without usurping legislative functions override the will of the people as thus expressed by their chosen representatives. * * * Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment in any case, unless it is apparent that its real object is not to protect the community or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty or property without due process of law."

The same conclusions have been reached in Illinois by its court of last resort.

> *Goddard* v. *Jacksonville*, 15 Ill. 589 (1854).
> *Wall* v. *Allen*, 244 Ill. 456.

It being within the police power of the state to wholly prohibit the sale of intoxicating liquors, to secure the peace and welfare of society, it is necessarily within its power to regulate and restrict the sale to any extent less than prohibition. The following holdings in various jurisdictions illustrate the theory that such power exists and that the busi-

ness of selling liquors can be variously restricted and that the right to engage in such business is not an inherent or inalienable right, and that any conditions less than positive prohibition attached to such business are valid. The right exists to prohibit women from frequenting saloons (*People* v. *Case*, 153 Mich. 98); to restrict the purchase and sale of intoxicating liquors to males only (*Re Carragher*, 128 N. W. 352); to restrict the sale of intoxicants to certain localities (*State* v. *Richardson*, 48 Ore. 591); to allow such sale in one county and prohibit it in another county (*Atkinson* v. *So. Express Co.*, 94 S. C. 444); to exclude any one except the keeper and his family from saloon during closing hours (*State* v. *Calloway*, 84 Pac. 27); and to prohibit entrance into saloons from alleys (*Maple* v. *Hiser*, 106 N. E. 37); also the right is generaly conceded that saloons may be closed Sundays and during certain hours of the night and numerous other restrictions and regulations none of which have been held to invade inherent rights in the commerce in intoxicating liquors.

It has been held that legislation which imposes a liability for dramshop damages upon property owners, who knowingly permitted their property to be used for the sale of intoxicating liquors, could not be considered an unlawful "taking" or "depriving" the owner of his property within the meaning of the constitutional prohibition. (*Bertholf* v. *Reilly*, 74 N. Y. 509.)

On the principle that the greater includes the lesser, the legislature, with power to prohibit, may regulate the liquor traffic to the extent of total prohibition. On this theory no one has an inherent right

superior to the legislative authority, either to sell, or to use his property as a place for the sale of intoxicants. Any conditions or restrictions which the law fixes as precedent to the right to sell intoxicating beverages are legal; and any one entering into this prohibitable commerce must necessarily, under the theory that all are bound to know the law, accept and agree to be bound by the existing provisions of the law. Hence it is that property owners have their future in their own hands when they rent their property for saloon purposes. They voluntarily subject themselves and their property to the conditions imposed by the regulatory measures of the statutes.

In the light of these established principles we will examine the act under the authority of which the proceedings in this case originated, and as applied to the facts in this case.

II.

THE DRAM SHOP ACT OF ILLINOIS AND ITS PURPOSE.

The Dram Shop Act of Illinois was passed in 1874, and has a title which tersely states the purpose of the law. The act is entitled "An Act to provide *for* the licensing of and *against* the evils arising *from* the sale of intoxicating liquors." The evils arising from the use of intoxicating liquors were known at the time of the passage of the Act in question. Those evils have been with the human race at least co-extensive with recorded history. It was no new situation with which the lawmakers were dealing. "The evils arising from the sale of intoxicating liquors" to minors and drunkards the

Act punishes by fines; and for injuries arising from intoxication it compensates by allowing rights of action for damages against the sellers and against property owners who knowingly permit the sale of liquors upon their property; and as additional security to persons injured it provides that the property where the liquor is sold may be subjected to the payment of any judgment against the tenant. The act provides for the licensing of dramshops and legalizes the sale of liquors thereunder, and prohibits the sale without license. The fines for sales to minors and drunkards, and the civil damage portions of the act are provisions and conditions attached to the saloon business and precedent to the right of any one to engage in the sale of intoxicants; these fines and civil damage provisions are intended to compensate the public and individuals against the "evils arising from" the liquor traffic which were known to the Legislature when it passed the law.

Section 9 of the Dram Shop Act provides that the person owning, renting, leasing or knowingly permitting premises to be used for purpose of selling intoxicating liquors shall be liable for damages resulting from intoxication, severally or jointly with the seller. This liability is a personal one.

Section 10 provides that dramshop property may be subjected to the payment of any dramshop judgment against the tenant, which remains unpaid. This section contemplates the taking of the landlord's property under dramshop judgments against his tenant under "proceedings * * * to subject the same to the payment of any such judgment recovered which remains unpaid," without the landlord being a party to or participating in the defense of

the original suit resulting in such judgment. The validity of this act is assailed in this proceeding as being in violation of the constitution prohibiting the taking of property without due process of law.

In their contentions upon this point opposing counsel wholly overlook the fact that the law regulating the use of property for saloons contains the *condition* that any property used for saloon purposes may be subjected to the payment of a dramshop judgment. This was the only condition on which plaintiffs in error could lawfully lease their property to the saloonkeeper Green. They could have made no contract with Green by which they could escape the statutory liability of their property to respond in damages in case of injury to a third party. They put their property in the saloon business conducted by Green, and it became equally liable to respond in damages with the tenant Green. The law of the state is the basis of every contract made within the state. Contracts may not rise higher than the law, and plaintiffs in error were presumed to know and contract with reference to the law. They had no inherent right to lease their property or permit its use for the saloon business, and, when they put their property in the liquor commerce, they impliedly subjected it to all of the conditions imposed by law.

The landlord is the controller of his own destiny, and that of his property, for when he thus engages in the saloon business with his tenant, he has, within the eye of the law, actually embarked in the saloon business by putting up his property alongside of his tenant's license, fixtures and liquors; one furnishes the place, the other the liquors, the state the

license, the citizen the money, and there is a going saloon business.

Now, intoxicating liquor is sold to intoxicate. The license is a permit to intoxicate. Experience has taught us that intoxicating liquors produce intoxication, and that intoxication produces injury. The legislature knew in 1874 that the Dram Shop Act would permit the intoxicating of husbands and fathers, and cause injury to wives and children, and an effort was made to balance up the law by giving damages to the persons surely to be injured.

Now, the legislature also foresaw, in 1874, that persons who had no property of their own in which to conduct a saloon might have no property of their own with which at the end of a lawsuit to pay a judgment, so they said in substance: "If a landlord wishes to rent his property for saloon purposes to tenants without financial resources or responsibility, he may do so, but he must do so upon the condition that such property be treated in the eye of the law as the property of the saloonkeeper; otherwise wives and children may be defeated of their rights as the tenant may own no property when a judgment is obtained."

There is not now, and never was there, any hardship in this rule. No owner has the right under the Dram Shop Act of 1874, except under the conditions limited, to rent his property for saloon purposes. He may say to the person desiring to rent for saloon purposes: "Give me your covenant to notify me of all suits for damages so that I may take part in the defense;" or "Give me a covenant to reimburse me for all damages I may suffer as a

result of your sales of intoxicants;" or "Give me my price and I will take chances;" or "Give me the guaranty of responsibile third parties; this done and I will rent you my property for saloon purposes." The presumption is that plaintiffs in error either got their own price for the rent or that, as business men, they protected themselves against loss from injuries by intoxication as from loss by fire or otherwise. If they took no precaution they have no basis for complaint that they had no knowledge of the suit resulting in judgment. They made their lease knowingly, with full knowledge of the law, and now, after their tenant has been sued, the case tried, the damages assessed, and their tenant, in whose hands they entrusted their rights and property, has failed to pay the judgment, they cannot evade the judgment of the law based upon their own deliberate action.

The principle involved in this case is similar to that involved in the proceeding by *scire facias* on a recognizance for the appearance of one charged with a crime. In case the party fails to appear the court enters judgment by default against the defendants for the amount of the recognizance. In such a case the court has said:

> "Thus stood the law at the time this recognizance was entered into and by which the plaintiff in error was informed that, if he became surety in the recognizance, judgment might be entered against him without the actual service of process upon him and to which he assented by executing recognizance. * * * He is presumed to have known the law and his rights and duties under it, and has no right to claim immunity, * * * and there is no hardship in it for he was free to execute the bond or decline."
>
> *Reitzell* v. *People*, 72 Ill. 416.

In formulating the Dram Shop Act the legislature, acting within its police powers, has fastened conditions upon property placed in the intoxicating liquor traffic. That the legislature of this state had the power so to do has never been judicially denied, and to ask the court to change the conditions fastened upon property used in the intoxicating liquor traffic is asking the court to take upon itself legislative functions and to hold for naught the laws passed in the exercise of the police powers of the legislature. To hold Section 10 unconstitutional would be to deny the police power of the legislature; to change and override the plain provisions of that section would not be a construction of a statute already passed, but a repealing or modifying of the provisions of the legislative body by the judicial department of the state or nation.

The question which the Supreme Court of Illinois decided in 1910 in the case of *Wall* v. *Allen*, 244 Ill. 456, has passed into and become a part of the body of the law of that state; and the facts out of which the case at bar grow happened after the decision of the Wall case; and the law as it existed and the interpretation placed thereon were in contemplation of law known to plaintiffs in error before the facts transpired which created the liability of their property in this case to respond to the judgment against their tenant, Green.

In the case of *Wall* v. *Allen*, it was shown that a dramshop judgment had been obtained against one Gathard for the sale of liquor which produced intoxication that resulted in the death of the husband of the plaintiff in that action, and that a bill had been filed to subject the premises in which the liquor

was sold to the payment of such judgment. The case went to the Supreme Court of Illinois on a demurrer to the bill, which raised the question whether the complainant was obliged, in addition to alleging the nature of the action and the recovery of a judgment, to also allege the existence of the facts which gave rise to the cause of action against Gathard, so that the defendant might go back of the judgment and contest the facts giving rise to the original cause of action and compel the complainant to prove that she had suffered damages equal to or exceeding the amount of the judgment.

The court held that the landlord

> "had his election to lease his premises for the sale of intoxicating liquors or to devote them to some other use, and to either permit them to be used for that purpose or to prevent such use, and we do not see how it can be said that he is deprived of his property without due process of law when he is permitted to contest the facts upon which the lien rests. * * * He must be held to have known that the law would also subject his premises to the lien for any judgment against the dramshop keeper, and he may properly be held to have voluntarily subjected them to the liability. The building and premises of the defendant were an integral and essential part of the dramshop, necessary to carrying on the business, and there appears to be no reason for saying that the legislature would not subject them to the lien for injuries resulting from the business."

After the Illinois Supreme Court had placed its interpretation upon Section 10 of the dramshop act of that state, any property owner who permitted his property to be used for dramshop purposes evidenced his consent to be bound according to the con-

ditions imposed by Section 10, as construed by that court, and should not now be heard to say that his property is being taken from him without an opportunity of defense.

The Supreme Court of Illinois was again called upon to consider the same question, raised under a similar statute, in the case of *Wing* v. *Little*, 267 Ill. 20. That case grew out of a gambling judgment which remained unsatisfied, and the plaintiff in the judgment filed a bill to subject the premises in which the gambling took place to the payment of the judgment, and made the owner of such property a party to the bill. The Criminal Code of Illinois authorizes a suit to recover money in excess of $10 lost at gambling, and contains a provision similar to that in the dramshop act that

> "such building or premises so used or occupied shall be held liable for and may be sold to pay any judgment that may be recovered under the preceding section. Proceedings may be had to subject the same to the payment of any such judgment recovered which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered."

In the case of *Wing* v. *Little*, *supra*, the defendant to the bill pleaded as a defense that said judgment was obtained through fraud and collusion. The trial court and the Appellate Court of Illinois denied the right of the defendant to raise such issues. The Illinois Supreme Court, however, decided that the pleas stated a good defense and remanded the case for trial upon proper issues.

There is no difference in principle between the case

of *Wing* v. *Little* and the case of *Wall* v. *Allen*. Opposing counsel endeavor to distinguish them by showing that gambling is something unlawful and that a gambling judgment had some intrinsic virtue or vice that a dramshop judgment has not. In each of these cases the legislature has said that any one who permits his property to be used either for gambling or for the sale of intoxicating liquors shall have such property subjected to the payment of any judgment for loss at gambling or loss resulting from intoxication. Gambling is made unlawful and the sale of intoxicating liquors can be and in some instances is made unlawful. It is the power of the legislature over the subject which gives validity to the enactment.

After the construction given the statute in the case of *Wall* v. *Allen* by the Illinois Supreme Court, and after the construction placed upon a similar gambling statute in the case of *Wing* v. *Little*, by that court, it would seem that the questions here contended for by opposing counsel ought to be foreclosed by these prior adjudications.

Opposing counsel have assumed in their argument that the right of action in a dramshop case is based upon the "*unlawful sale*" of intoxicating liquors, or "in violation" of the dramshop act, or on "sales of liquors to an intoxicated person," and claim that "as long as the dramshop keeper did nothing *unlawful*, appellants could not be held liable;" and that "it was not until the dramshop keeper sold too much liquor to appellee's husband that the prior lawful act became *unlawful*;" and asks if it can be possible that the owner of premises can be held liable "because his lessee committed an *unlawful* act

in the sale of liquor to an intoxicated person without his knowledge" and makes the claim that "the legislature intended that notice of either *unlawful* sales or *unlawful* giving away of liquor to an intoxicated person should be given to the owner of the premises," because of the provision of the act that the *unlawful* sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant to the premises where the *unlawful* sale is made.

The provisions of the statute concerning "unlawful sale" of intoxicating liquors refers to prior sections of the act which prohibit under penalty the sale of intoxicants to minors and drunkards, and without license, etc., and has no reference to the ordinary sales of intoxicants within the law, pursuant to license.

The assumption of counsel that the ordinary dramshop case is based upon the unlawful sales of intoxicating liquors is clearly an erroneous view of the law. Intoxicating liquor is sold by leave of law for purposes of intoxication. It is expected that it will produce intoxication. It is not necessary that the sale of liquor be unlawful to produce injury. Intoxication is a relative term and there are degrees of intoxication. The lawful sale of liquor produces intoxication, and the intoxication produces injury, and usually far from the scene of the sale. For example in the case of *Bertholf* v. *O'Reilly*, 74 N. Y. 509, a horse was driven to death as a result of intoxication. Liquor may be lawfully sold and carried away and produce intoxication; or one drink taken by a sober person may intoxicate and result in injury. Hence, the question whether the sale was law-

ful or unlawful formed no part of the substance of the suit back of the judgment in question.

The Illinois Dram Shop Act provides for no notice to the saloon man or landlord either in express terms or by implication. The landlord is put on notice by the statute and, having rented his property for a purpose which he knows is followed usually by a wake of misery, poverty, suffering and damage, it is for the landlord who has made such condition possible, by allowing his property to be used for such purposes, to keep in touch with the situation rather than that minors and women, who have no knowledge of the sales, lawful or unlawful, being made upon the landlord's premises, should give the landlord notice. Acting with knowledge in law of the consequences usually flowing from the saloon business, the landlord is bound to know the natural and probable consequences of his acts. Plaintiffs in error cannot now be heard to say that Delia Garrity gave them no notice that she was being injured, when they had knowledge in law that she might be injured. In any event, that statute does not make notice a prerequisite to a suit for damages. Statutory action is not given for damages resulting from intoxication from "*unlawful sales*," and the whole argument in Paragraph I of opposing counsel's brief must fall for the reason that it is based entirely upon the erroneous assumption that the statutory action is given for damages from unlawful sales.

Opposing counsel say that Sections 9 and 10 of the Illinois Dram Shop Act must be read together, and say that defendant in error insists that Section 10 makes the lessor liable without suit for the payment

of a judgment against his lessee. They then claim that the provisions of Section 9, which makes the landlord liable jointly with the keeper of the dramshops, are therefore superfluous and meaningless under such construction. But plaintiffs in error are merely placing the defendant in error in a position which they would like to have defendant in error assume and then making an attack upon such position. We take no such position, for such position erroneously assumes that Section 10 makes the landlord *personally* liable for the judgment against his tenant. Section 10 makes the *premises* where the liquor is sold liable for the judgment and not the landlord personally.

Opposing counsel have suggested that the saloonkeeper is a person "with meager income and little property." Perhaps the legislature appreciated this point when they passed the law. The legislature made provision by Section 9 that persons selling or giving intoxicating liquors, and persons owning, renting, leasing or permitting the occupancy of a building for such purposes shall be jointly liable for injuries resulting from the sale thereof. If suit is brought against the owner in the first instance, personal liability for all damages allowed in any judgment in such suit would follow the owner and attach as against all his property. The provision of Section 10, which makes the *property* liable for the judgment, is designed for practical purposes and is intended to protect persons who may be injured by the liquor traffic in the hands of persons "with meager income and little property," by subjecting the property where the liquor is sold to the payment of the judgment.

If the construction contended for by plaintiff in error be given to the statute, then the provision subjecting the particular property rented for saloon purposes to the judgment would add nothing to the statute, as under such construction all of the property of the landlord would be liable under such judgment, as he would be a party thereto. However, both sections can be given effect by construing the statute according to its plain and obvious meaning. Section 10 provides that the landlord's property where the injurious sale was made "may be sold to pay the judgment against *any person occupying such building* or premises," and that "proceedings may be had to *subject the same* to the payment of any such judgment recovered which remains unpaid," etc. Section 9 provides for suits against persons selling or contributing property to sell in, and Section 10 provides for means of enforcing the judgment. They are plainly consistent.

There are reasons why direct proceedings against the owner of the property jointly with the keeper may not be practical. The landlord may be absent or a non-resident and yet have contributed to the injury in question by permitting the use of his building for the traffic. Under Section 10 his absence or non-residence would not protect him, as the practical effect of the statute is to give a remedy against the building and premises if a liability is established against the keeper of the saloon and such keeper is not able to satisfy the judgment. The effect of the statute is to give injured persons a practical remedy to enforce payment of damages by every one, and all property, contributing to the damages.

III.

POWER EXISTS TO FASTEN LIABILITY ON PROPERTY USED FOR DRAMSHOP PURPOSES.

The constitutional question presented by this case is whether the legislature had the right within its police power to enact that any property which its owner might knowingly permit to be used as a place to sell intoxicating liquors might be subjected to the payment of a judgment against the tenant where such sale should produce injury and the resulting damages should be reduced to judgment.

The only point urged by opposing counsel upon this question is that the act is unconstitutional because the statute permits their property to be taken to pay a judgment against a third party to which action they were not a party. They do not contend but that the owner may be made personally liable equally with the tenant.

Their objection is, in effect, that the legislature has no power to subject property to the payment of a dramshop judgment by a bill in the nature of a supplementary proceeding to be had for that purpose, using the original judgment as a basis therefor. They make no attack upon the original proceedings except by demurrer. Their contention is that property cannot be taken to pay such a judgment unless the owner is party to the original proceeding in which the judgment was had.

It seems apparent that, if the legislature has power to make persons liable for damages, it may also make offending property liable for the same damages. Con-

ceding the power of the legislature to prohibit commerce in intoxicating liquors, the necessary inference is it may fix such conditions upon persons and property in that trade as it may deem best for the protection of the public. Assuming that the legislature had omitted to make the owner liable personally, could it be reasonably contended that the owner's property used for saloon purposes could not be made liable?

The statute fastens no liability upon the property until it shall have been judicially established that damages have been caused by the use of the property for dramshop purposes. The action to subject it becomes one *in rem*. It is not against the owner personally, it is against the property. The owner is made a party to the supplementary proceeding for the purpose of allowing him his day in court as to his rights in the property, if any he has to urge, which may be superior to the judgment.

Our statute provides for the judgment becoming a lien upon the property where the liquor is sold but as the property must be identified by some judicial determination there must be an action to identify and fix the description of the particular property and to notify the owner so he may take such steps as he may be advised to protect his rights therein. The lien only attaches when the particular property is judicially identified. *Binder* v. *Finkbone*, 25 Ohio St. 114.

By voluntarily placing his property in the dramshop business the owner has consented to be bound by the provisions of the statute which has placed limitations upon the use of property for such pur-

poses. He surely cannot be heard to say that his property is not bound by any valid judgment against his tenant. His day in court furnishes the owner with all the remedies offered by a court of chancery jurisdiction for the protection against any *invalid* judgment. But the fact that he is not a party to the judgment against his tenant is no test of the question whether the judgment is valid or invalid.

The point has been passed upon in several jurisdictions both in identical and analogous cases, and such laws have been uniformly upheld, although there is some contrariety of opinion in one jurisdiction as to the method of pleading and proof.

The State of Ohio has a statute upon the subject and is the state from which the legislature of Illinois took its dramshop laws. The two statutes are practically identical in their provisions. (*Streeter* v. *People*, 69 Ill. 598.)

In a case arising under the Ohio law where the same defense was interposed as in the case at bar, the Supreme Court of that state said:

> "To subject the leased premises to the payment of the judgment recovered against the tenant an action must be instituted in a court of competent jurisdiction, for that purpose, against the lessor and prosecuted to a final judgment against him. The plaintiff in that action must allege in his petition all the facts required by the statute to make the premises liable. * * * Whether the premises are liable for the payment of the damages awarded the plaintiff against the person whose illegal sale of liquor caused them, is the question which concerns the defendant, and on that question he has his day in court, with full opportunity to be heard. He has the right to appeal from any judgment that may be rendered against him and may prosecute

> error as in other civil actions; so that, he is not, in any sense, deprived of his remedy by due course of law nor of his property without due process of law."
>
> *Mullen* v. *Peck*, 49 Ohio St. 461.

The State of Iowa has a law which provides that fines assessed and judgments imposed for violations of their liquor laws shall be a lien upon property used with the consent or knowledge of the owner by the manufacturer or seller. The Iowa court said, in disposing of an objection that the law took property without a trial and violated the constitution as to due process of law:

> "Before the property can be made so liable it must be established as a fact that the property was so used with the owner's knowledge or consent. True the statute does not provide the manner in which this is to be made to appear, and it is not necessary that it should do so. It is sufficient that the existence of this fact is made a condition precedent to the liability of their property and that the statute does not provide that the property shall become liable without a judicial determination that the fact exists. * * * It follows that the statute does not authorize the taking of property without a trial and that it is not vulnerable to this objection urged by appellant."
>
> *Polk County* v. *Hierb*, 37 Ia. 366.

In a later Iowa case, *Buckham* v. *Grape*, 65 Iowa 535, the question was raised whether the judgment against the tenant could be introduced as *prima facie* evidence of the amount of the damages awarded against the tenant and by a divided court it was decided that unless there were other evidence given which would show the damages to be equal to the

amount of the judgment, a case had not been made out. That case, however, can only be considered as having established a rule of evidence in the Iowa jurisdiction. It only declared where the burden of proof was in such cases and established only what was to be due course of the law in Iowa. The court said:

> "It (the judgment) should not be regarded as evidence of liability of the property if the owner has not been made a party to the proceeding in which it was rendered."

In that case also (65 Ia. 535) the court asked the question in its decision:

> "Why not determine all the issues which the property owner may raise in the action against the vendor, the property owner being joined therein? * * * If he be made a party to the action, he would be bound by the judgment, and without further proceedings it could be declared a lien upon his property."

But if by the above quotation it was meant to establish a rule of procedure for their courts, such rule was abandoned in that jurisdiction as in a still later case, *McVey* v. *Mannot*, 80 Iowa 135, the court said:

> "But this court never has determined that an action may not be brought against the saloon keeper and prosecuted to judgment, and another action against the landlord to make a judgment a lien on the premises. On the contrary, while the question is not directly determined, the right to maintain two actions is recognized in *La France* v. *Krayer*, 42 Iowa 143, and in *Buckham* v. *Grape*, 65 Iowa 535. We think that it ought not to be held that a subsequent action against the landlord may not be maintained."

In a still later case, *State* v. *Kelly*, 151 Iowa 264, the Iowa court again recognized the right to two

actions, one against the tenant to reduce the damages to judgment and then an action to subject the property used for dram shop purposes to the payment of that judgment.

It is respectfully submitted that the Iowa courts have decided that an owner's property may be taken by supplemental proceedings founded upon a dramshop judgment against his tenant, and are opposed to the theory advanced by plaintiffs in error.

The utmost that may be urged as to the Iowa cases is that they have established a rule of what shall be *prima facie* evidence in such cases and due course of law in Iowa. But what may be due course of law in Iowa by their procedure and practice is not the test of what is proper practice and procedure and due course of law in Illinois. To adopt such test in this court would permit a litigant to try his case by one procedure in his own state and have it reversed in this court by the application to his case of the procedure of some other state.

The Supreme Court of Kansas has also held a similar statute valid and sustained a decree establishing a lien upon the owner's property and decreeing its sale to satisfy a fine and costs against the tenant in supplemental proceedings against the owner.

Hardten v. *The State*, 32 Kans. 637.

The Supreme Court of Illinois has several times passed upon this point. In an identical case, *Wall* v. *Allen*, 244 Ill. 456, the court sustained a decree in a supplemental proceeding and allowed a judgment against a tenant to be satisfied out of the sale of the owner's property used for dramshop purposes

to his knowledge. In the case of *Wing* v. *Little*, 267 Ill. 20, a supplemental proceeding based upon a judgment obtained for gambling losses was recognized as a proper proceeding, and again in the case at bar this method of proceeding was sustained as proper.

In the case of *Marvin* v. *Trout*, 199 U. S. 212, this court sustained a decree in a supplemental suit brought to enforce a judgment obtained for money lost at gambling in property knowingly permitted to be used by the owner for gambling purposes.

Opposing counsel has not cited a case which sustains their contention on the point raised. The decided cases and the logic of the situation are against such contention.

IV.

REGULARITY OF JUDGMENTS PRESUMED.

Plaintiffs in error contend that Delia Garrity should have gone back of the judgment obtained against the tenant dramshop keeper, Green, and have alleged and proven her case over again in this action, and that the court in decreeing upon the faith of her judgment as *prima facie* sufficient, has taken the property of plaintiffs in error without due process of law, that the decree has made their property liable for a judgment that perchance *might have been* rendered by reason of collusion between their tenant and defendant in error, not that it was so rendered.

Such position does not raise the constitutional question supposed; but on the contrary does raise the question whether a court will, when called upon to consider a judgment in a collateral action founded upon it, indulge or desert the ancient doctrine of the

law that when jurisdiction of parties and subject-matter are shown the regularity of such judgment will be presumed and acted upon until persons desiring to avoid its effect have pleaded and proven facts sufficient in law to avoid it.

A judgment showing jurisdiction of parties and subject-matter cannot be impeached by a demurrer. Fraud, collusion and overreaching in obtaining judgments are affirmative defenses; they are not presumed; they are defenses to be issuably pleaded; and pleadings designed to obtain relief from fraud, collusion or other prejudicial acts must set forth the facts upon which the charge is predicated. Arguments upon demurrer do not have the force of pleadings. Even a court of equity will not, on behalf of a defendant, set aside or disturb a judgment where there has been no service of process upon him until it appears that the "result will be other or different from that already reached."

Freeman on Judgments, p. 420.
Colson v. *Leitch*, 110 Ill. 507.

Plaintiffs in error can occupy no better position here than a defendant not served with process. Their complaint is that they were not served in the original suit against Green, the tenant. The principle, if not the exact facts, is the same.

In an action brought in the State Court of the State of Vermont upon a judgment of the Circuit Court of Cook County, Illinois, the declaration did not aver either jurisdiction of the parties or subject-matter in the court where the judgment was rendered, and the defendant demurred generally to the declaration. It was held that it was not necessary

to aver either jurisdiction of parties or subject-matter. This decision was under the constitutional provision that judgments in sister states shall be given the same force and effect when pleaded or offered in evidence in the courts of any other state, as in the state where rendered.

The court recognized the rule that such judgments might be impeached, but held that they could not be impeached by a demurrer.

Ferry v. *Miltimore Car Wheel Co.*, 71 Vt. 457.

In a case in which errors were apparent upon the record the Supreme Court of Illinois refused to permit a judgment to be collaterally attacked by a stranger and said:

> "If the court had jurisdiction of the person of the defendant, and of the subject matter of the suit, then whether its decisions were correct or not, the judgment, until reversed, is binding in every other court."

Swiggart v. *Harber*, 5 Ill. (4 Scam.) 371.

This court in an ejectment suit where title had been obtained through defective judicial proceedings which were collaterally attacked, said:

> "There is no principle of law better settled than that every act of a court of competent jurisdiction shall have been presumed to have been rightly done, till the contrary appears; this rule applies to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which henceforth proves itself without reference to the evidence on which it was adjudged."

Voorhees v. *Bank*, 35 U. S. (10 Pet.) 472.

In this case it is true, the judgment was upon the default of the dramshop keeper, Green; he was defaulted in September, 1912, and the cause was heard upon the regular trial call in October, 1914, and the evidence was heard and the damages were assessed by a jury. The judgment was on the verdict. But that the judgment was by default does not deprive it of any of its virtue or vigor or change the presumption of its regularity. It was not for the court to presume it collusive or fraudulent or otherwise defective, or even excessive; as it showed jurisdiction of parties and subject-matter, it was proper to let it stand until assailed by facts legally sufficient to avoid it.

Default judgments possess in law all of the essential qualities of other judgments and all of the presumptions attach thereto as in cases of other judgments and are just as conclusive.

French v. *Baker*, 21 Ill. App. 432.
Duffy v. *Frankenberg*, 144 Ill. App. 103.

This court has said in giving effect to a default judgment:

> "A default judgment is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest. * * * A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission."
>
> *Last Chance Mining Co.* v. *Tyler*, 157 U. S. 691.

The demurrer of plaintiffs in error admitted the judgment to be binding in law upon the tenant to the

amount of the damages adjudicated; and this being true it followed of necessity that under Section 10 of the Dramshop Act

> "proceedings * * * to subject the same (landlord's saloon property where liquor sold) to the payment of any such judgment recovered which remains unpaid"

were proper to be prosecuted to subject the property to the payment of the judgment. The decree over the demurrer for the amount of the judgment was therefore proper.

V.

THE ILLINOIS RULE IS THAT A JUDGMENT IS PRIMA FACIE EVIDENCE OF THE DAMAGES IT REPRESENTS.

Turning now to the particular and recognized practice in the courts of the State of Illinois, it will be seen that it has long been the settled rule of practice in the Illinois courts to treat a judgment as *prima facie* evidence of the damages it represents.

In 1853 the Supreme Court of Illinois held that a surety on an administrator's bond was bound by a judgment on the bond unless he could show some equitable defense thereto.

Ralston v. *Wood*, 15 Ill. 159.

In 1872 the Supreme Court of Illinois held that in a suit upon a bond of an administrator, the judgment against the principal

> "Like any judgment rendered by a court of general jurisdiction having jurisdiction of the person and subject matter, it can only be impeached in collateral proceedings for fraud."

Housh v. *People*, 66 Ill. 178, 182.

In 1896 the Supreme Court of Illinois again held that a surety was "bound and concluded by the judgment against his principal in the absence of fraud or collusion," and said further "the judgment against the principal in such case is *res adjudicata*, and cannot be collaterally attacked in the action on the bond."

Nevitt v. *Woodburn*, 160 Ill. 203, 210.

In 1910 the Supreme Court of Illinois held in an identical case with the case at bar that the judgment against the saloonkeeper settled the existence of the cause of action and the amount of damages in an action *in rem* against the property upon notice to the owner. In that case, as in this, the defendant stood by his demurrer.

Wall v. *Allen*, 244 Ill. 456.

In February, 1915 (after this suit was commenced, but nine months before the decree in this case was entered) the Supreme Court of Illinois, in a suit on a gambling statute to subject property in which gambling was done to the payment of a judgment rendered for money lost in gambling, decided that the judgment sued on was *prima facie* good until impeached for fraud or collusion, and allowed a plea raising the issue of fraud and collusion to stand.

Wing v. *Little*, 267 Ill. 20.

The legislature of Illinois in 1845 enacted that in cases of Bills in Equity for injunctions to stay a judgment:

> "Only so much of any judgment at law shall be enjoined as the complainant shall show him-

self equitably not bound to pay, and so much as shall be sufficient to cover costs."

Sec. 7, Chap. 69, Hurd's Revised Stat. Illinois.

In 1884 the Supreme Court of Illinois in an action to enjoin a judgment where the defendant had not been served, refused to disturb the judgment in the absence of anything otherwise alleged against its merits but remarked:

"Had an offer been here made by the bill to pay whatever amount might be found due on the debt a different case would have been presented."

Colson v. *Leitch*, 110 Ill. 504, 509.

It is also the rule in the United States courts that the surety on an administrator's bond cannot attack a judgment against his principal collaterally.

Stovall v. *Banks*, 77 U. S. (10 Wall.) 588.

The rule of practice in Illinois is that a general demurrer which fails to point out any defect in the bill is properly overruled if there appears to be equity in the bill.

Langlois v. *McCallom*, 181 Ill. 195.

If the Dram Shop Act of Illinois is a valid enactment and within the powers of the legislature, then the bill in this case had equity in it as it contained all the jurisdictional elements required by the statute, to subject the property to the dramshop judgment in question, and the demurrer was properly overruled and as defendants refused to plead to or answer the bill the decree over the demurrer was proper practice in Illinois courts.

VI.

DUE PROCESS OF LAW BY THE JUDICIARY DEPARTMENT. SETTLED PRACTICE OF THE PARTICULAR STATE COURT IS DUE PROCESS OF LAW FOR THAT STATE.

It is respectfully urged that the mode of procedure adopted to subject the property of plaintiffs in error to the payment of the judgment in question was "due process of law" within the meaning of the constitutional prohibition. The Legislative Act in question does not attempt to direct the particular mode to be used but simply says:

> "Proceedings may be had to subject the same (building and premises) to the payment of any such judgment recovered."

Where a state court of Ohio had made an error in procedure in a Guardian's Sale by failure to require a bond, it was said by this court:

> "At most this was an error of judgment in the court. The constitutional provision is nor shall any *state* deprive any person of life, liberty or property without due process of law. Certainly a state cannot be deemed guilty because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The legislature of a state performs its whole duty under the constitution in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the courts and the the correction of errors in judicial proceedings."

Arrowsmith v. *Harmoning*, 118 U. S. 194.

The defendant in error adopted a proceeding in

equity in which the widest latitude of defense is permissible. In fact one of the most ancient grounds of equity jurisdiction was its relief against unjust judgments at law. If the plaintiffs in error conceived that the verdict of the jury was so excessive as to work a wrong or injustice to them or that any fraud had been perpetrated or perjury committed or collusion practiced in obtaining the judgment, they had their opportunity, and it was competent and proper to bring such facts, or any facts they might have chosen to allege, to the attention of the court by proper pleadings and tender evidence thereon. But plaintiffs in error elected to protect themselves by demurrer; not denying or avoiding but by admitting the facts. The rule is universally acknowledged that a demurrer admits all that is well pleaded and the foundation of the rule is said to be

> "That the party demurring, having had his option to plead or demur shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse."
>
> *Aurora City* v. *West*, 74 U. S. (7 Wall) 99.

The record shows that when their demurrer was overruled plaintiffs in error were called upon by the court "to set a time in which to plead or answer" and they chose not to plead and "elected to stand by their demurrer." (Decree, Abst., 12.)

Had plaintiffs in error set up by way of plea or answer any matters affecting the right of defendant in error to subject their property to the judgment and had such defenses been denied them on hearing, they might properly allege that they did not get due process of law. By demurring they got all that they asked and that was a decision of law

upon the case made by the bill. In the proceedings had leading up to the decree of sale of their property there was a bill filed alleging the leasing of the property for dramshop purposes; that damages flowed from such leasing by sales of intoxicating liquors made by their tenant upon such property which had been reduced by defendant in error to judgment; that such judgment remained unsatisfied of record and thereon a prayer made to subject the property to the payment of the judgment, and praying for an accounting in reference thereto; there was a summons against plaintiffs in error which required them by the language of the process "to answer unto Delia Garrity in her certain bill of complaint, filed in said court on the chancery side thereof." The plaintiffs in error appeared, and chose as their mode of defense a demurrer, stood by it and were allowed an appeal from the decree over their demurrer. They had their hearing in the court of last resort of their state and are here upon an allowance of a writ of error upon the affirmance of the decree.

What element in due process of law was lacking? They were heard in the trial court on every point they chose to present; and in the court to which they appealed they presented their case on briefs and written and oral arguments, and their contentions were heard and considered. They obtained a decision upon the record they made for review.

But they claim they were deprived of their right to due process of law in the practice and procedure adopted, that is, they claim that the treating of the judgment as *prima facie* evidence of the extent of

the damages was an unwarranted action of the court and that thereby the State of Illinois, through her judiciary, has taken their property without due process of law. If the settled practice and procedure of the courts of their state was followed they had the due process of the law as administered in their state.

It has been held by this court that the legislature of a state has the power to provide what shall be deemed *prima facie* evidence as such laws change only the burden of proof and do not invade rights, and it is respectfully submitted that when a court of last resort has from time to time held that a judgment, when called into question collaterally, shall be deemed *prima facie* evidence of the amount of damages that it represents, such holdings of the court of the last resort in the state have all the effect of a statute enacted for that purpose and such holdings are the law, and litigants and trial courts are effectively bound thereby as by the force of a statute.

In the case of *Turpin* v. *Lemon*, 187 U. S. 51, which was a contest over a tax title, this court held that the legislature could change the common law burden of proof as to tax deeds so as to make a tax deed *prima facie* evidence of title without infringing the right to due process of law as that act only established a rule of evidence. Had the legislature of Illinois enacted that a dram shop judgment against a tenant should be received in evidence as *prima facie* evidence of the damages it represented in an action to enforce it against the property where the liquor was sold it would hardly be doubted but that

such law would be within the power of the legislature to enact.

In the case of *Kennard* v. *Louisiana*, 92 U. S. 480, Kennard claimed that the State of Louisiana through her judiciary had deprived him of his office in a hasty proceeding in which he was cited to answer in 24 hours and where within the time limited he appeared and answered and there was judgment of ouster. He was allowed by law one day to appeal and two days to make his return to the Supreme Court which he perfected and made and there was judgment on such appeal against him, which judgment by law was final in one day; and at the end of the fourth day from his citation in the trial court he had made his way through the courts and was out of office. This court said in answer to his objection to these proceedings that they deprived him of due process of law:

> "The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard but he was in fact heard both in the court in which the proceedings were originally instituted, but upon his appeal in the highest court of the state." (P. 483.)

In reference to the jurisdiction of this court to hear and determine such a case in which a party has used the forms of procedure provided by his state, the court further said:

> "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but

whether the law if followed would have furnished Kennard the protection guaranteed by the constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all."

In other cases involving the question under discussion the courts have said:

"This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state."

Walker v. *Sauvinet*, 92 U. S. 90.

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which requires and preserves these principles of liberty and justice must be held to be due process of law."

Hurtado v. *California*, 110 U. S. 516.

"It is quite clear that this (14th) amendment only requires that each state shall observe due process provided by its own laws in all cases and in respect to all persons."

McKee ex parte, 19 Utah 243.

In a case nearly resembling the case at bar in the contentions made that the rule used to compel the defendant to pay a judgment which it had defended but to which it was not a technical party was based on the assumption that the defendant was bound by the judgment "which precluded the setting up of any defense to it." In answer to that argument, this court said:

"The argument, therefore, asks us to say that

> the Louisville and Nashville in the proceeding in which it was duly served, and to which it responded and as to which it had its day in court, was deprived of defenses which it never asserted, and that due process of law was not administered to it because it was unheard in respect to matters concerning which it made no claim. But this court cannot be called upon to conjecture that defenses existed which were not made and to decide that proceedings in a state court have denied due process of law because defenses were denied, when they were not presented, and especially must that be so where the court of last resort of the state, on review of all the proceedings, has held that full opportunity to make every defense was afforded."
>
> *Louisville and Nashville Rd. Co.* v. *Schmidt*, 177 U. S. 239.

As plaintiffs in error had the benefit of the rules of practice and procedure in the form of action adopted, they necessarily obtained due process of law by the judiciary department of Illinois.

CONCLUSION.

It is respectfully contended that Sections 9 and 10 of the Illinois Dramshop Act were within the police power of the legislature to enact and therefore the *state* has not through its legislature taken property without due process of law; that the dramshop judgment obtained by Delia Garrity is regular, and that all presumptions are for its validity and binding effect; that in order to question its validity the plaintiffs in error should have brought forward affirmative defenses and could not protect themselves against it by a mere demurrer; that by the original bill filed herein the plaintiffs in error were given an opportunity to protect their rights in the property in question by the procedure of the State of Illinois; and therefore the *state* has not through her judiciary taken the property of plaintiffs in error without due process of law; and that as no due process of law was denied to plaintiffs in error the decree should be affirmed.

Respectfully submitted,

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